EMPLOYMENT TRIBUNALS

Claimant: **Mr H Shittu**

Respondent: **South London & Maudsley NHS Foundation Trust**

Heard at: London South

On: 08, 09, 10, 11, 12, 15, 16, 17 January & 21, 22, 23 May 2018
In chambers 12, 13, 14 June and 10, 11 and 12 September 2018

Before: Employment Judge Freer
Members: Ms B C Leverton
Mr N Shanks

Representation
Claimant: Ms H Platt, Counsel
Respondent: Ms L Chudleigh, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. **The Claimant's claims of detriment on the ground of having made a protected disclosure; detriment on the ground of health and safety; automatically unfair dismissal by reason of a protected disclosure; automatically unfair dismissal by reason of health and safety and wrongful dismissal are dismissed upon withdrawal;**

2. **The Claimant's claim of ordinary unfair constructive dismissal is successful;**

3. **The Claimant's claims of discrimination arising from disability and a failure to make a reasonable adjustment are successful in part;**

4. **The Claimant's claims of direct disability discrimination, indirect disability discrimination, harassment, and victimisation are unsuccessful;**

5. **The Claimant's claims of unauthorised deductions from wages were presented to the Tribunal out of time and the Tribunal has no jurisdiction to consider them having regard to provisions relating to the statutory time limits.**

REASONS

1. By a claim presented to the employment Tribunals on 26 October 2016 the Claimant claimed:

   - Direct disability discrimination
   - Discrimination arising from disability;
   - Indirect disability discrimination;
   - A failure to make reasonable adjustments;
   - Harassment;
   - Victimisation;
   - Detriment on the ground of having made a protected disclosure;
   - Detriment on the ground of health and safety;
   - Ordinary constructive dismissal;
   - Automatically unfair dismissal by reason of a protected disclosure;
   - Automatically unfair dismissal by reason of health and safety;
   - Unauthorised deductions from wages; and
   - Wrongful dismissal.

2. The Respondent resists the claims.

3. The Claimant gave evidence on his own behalf together with Ms Angela Christie, Advisor in Patient Advice and Liaison Services for the Respondent; Ms Michelle Davis, Policy Co-ordinator within the Audit Team for the Respondent and Ms Lynh Sy, Team Administrator in the Complaints and Serious Incident Team for the Respondent.

4. The Respondent gave evidence through Ms Edith Adejobi, Interim Assistant Director of Serious Incidents and Complaints; Ms Mary O'Donovan, Head of Quality; Ms Kay Burton, Head of Assistant Director of Mental Health Legislation, Dr Neil Brimblecombe, Director of Nursing; Ms Amanda Pithouse, Deputy Director of Nursing and Quality; and Ms Sally Dibben, Head of Employee Relations.

5. The Tribunal was presented with five lever-arch bundles of documents comprising over 2,000 pages and additional documents during the course of the hearing as agreed by the Tribunal.

The Issues

6. Unusually this case arrived before this Tribunal with no list of issues agreed or produced in advance. It is unusual in a number of respects. Typically it is a standard feature of Tribunal claims for a list of issues to be produced and agreed early on in proceedings. It gives guidance to the scope of the disclosure, the extent of the witness evidence and the length of the Tribunal hearing. The Claimant argued 13 heads of claim and the parties arrived at the full merits hearing with a 14 page List of Issues (pages 75 to 88 of the bundle), which itself cross-refers by way of further expansion to the Particulars of Claim (which itself is 16 pages long), with disability in dispute and lists, for example,

36 events in respect of the constructive dismissal claim which are then mirrored in varied combinations as detriments in all the discrimination claims with 20 pcp's for the indirect discrimination and reasonable adjustment claims.

7. Even that List of Issues was deficient in that, for example, it was not stated which of three alleged disabilities was argued to apply to each allegation of disability discrimination and harassment, which alleged pcp's applied to which allegations of substantial disadvantage in the reasonable adjustment claim, and which alleged protected acts applied to which allegations of detrimental treatment in the victimisation claim.

8. Whilst not wishing to follow slavishly a list of issues, either that document, or the Grounds of Complaint, or both, indicated a substantial case.

9. The Tribunal considered that it was not in accordance with the overriding objective to send the case away given both the listing delay for a case of this length (a hearing of ten day or more would not be listed until at least mid 2019) and the organisation required to arrange a date when all participants could attend. The Tribunal decided to continue with the hearing.

10. After discussion, the Claimant withdrew claims of automatically unfair dismissal and detriments by reason of a protected disclosure; automatically unfair dismissal and detriments by reason of health and safety and wrongful dismissal. As such they are formally recorded as dismissed upon withdrawal. A few events and pcp's relied upon were also withdrawn.

11. The initial hearing almost inevitably went part-heard and the Tribunal has been required to undertake a *very* substantial amount of work to assess each issue raised when reaching its decision. The Judge is grateful for the diligence and hard work of the Tribunal members.

12. Unfortunately, delay has been caused for unforeseen circumstances, mainly illnesses. The Tribunal confirms that the primary findings of fact were made at the start of its deliberations and longer time than originally planned was scheduled in-chambers to allow for full and careful consideration of the conclusions.

13. It was agreed that the Tribunal in the first instance would address liability only.

A brief statement of the relevant law

Unfair constructive dismissal

14. The law relating to constructive dismissal is well-established and requires generally four conditions to be present:

· There must be a breach of contract by the employer;

· That breach (or series of incidents) must amount to a fundamental breach;

· The employee must leave employment as a consequence of that breach (whether express or repudiatory); and

· The employee must not affirm the breach

(see **Western Excavating (EEC) Ltd –v- Sharp** [1978] IRLR 27, CA)

15. The common law relating to contractual terms and breach of contract is also well-established. It is an objective analysis for the Tribunal.

16. A breach of an express or implied term must be considered objectively (see **BG plc –v- Brien** [2001] IRLR 496, EAT).

17. Where a claimant has been constructively dismissed, the Respondent must show that the reason for dismissal is one of a number of permissible reasons.

18. If so demonstrated, the Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4) of the Employment Rights Act 1996. The standard of fairness is achieved by applying the range of reasonable responses test.

19. In the case of **Malik –v- The Bank of Credit and Commerce International SA** [1997] IRLR 462, HL, confirmed that the implied term of mutual trust and confidence is implied into every contract of employment. With regard to a breach of that implied term Lord Steyn stated: “The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee” (see also **Omilaju –v- Waltham Forest London Borough Council** [2005] ICR 481, CA).

20. An employee’s subjective belief as to how they believe they have been treated is not relevant, even if genuinely held (see **Omilaju**).

21. With regard to a ‘final straw’ constructive dismissal, the Court of Appeal in **Omilaju** held:

> “A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any

> reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.
>
> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.
>
> Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer".

22. The Court of Appeal in **Cantor Fitzgerald -v- Callaghan** [1999] ICR 639 addressed the issue of pay and constructive dismissal:

> ". . . the question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration, and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events. If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand, if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the Court might be driven to conclude that the breach or breaches were indeed repudiatory".

Disability

23. Disability is a protected characteristic under the Equality Act 2010 by virtue of section 6.

"(1) A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
(2) A reference to a disabled person is a reference to a person who has a disability.
(3) In relation to the protected characteristic of disability—
(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
(6) Schedule 1 (disability: supplementary provision) has effect."

24. Schedule 1 sets out important supplementary provisions to the determination of disability, in particular relating to "impairment", "long-term effects"; "normal day-to-day activities"; "substantial adverse effects"; and "the effect of medical treatment". The Tribunal will not repeat these provisions in these reasons, but the Tribunal has referred itself fully to them.

25. There is also Secretary of State "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)" ("the Guidance"). The Guidance does not impose legal obligations itself, but the Tribunal has taken it into account where it appears to be relevant.

26. When assessing any adverse effect on normal day-to-day activities, the Tribunal should focus on what the employee cannot do or can do only with difficulty (**Goodwin –v- Patent Office** [1999] ICR 302); take into account the time taken to carry out an activity; the way in which it is carried out; the effects of environment; the cumulative effects of the impairment; and the extent to which the person can reasonably be expected to prevent or reduce those adverse effects.

27. Where the impairment is subject to treatment or correction, the impairment is to be treated as having the effect it would have without the measures in question (save for some specific circumstances, such as wearing glasses), even if the measures result in the effects being completely under control. The burden to prove any deduced effect is on the Claimant (**Woodrup –v- Southwark LBC** [2003] IRLR 111 and Guidance at paragraphs B12 &13).

28. The long-term nature of an effect is set out in paragraph 2 of Schedule 1. It is "likely" an event will happen "if it could well happen" rather than if it is "more

probable than not" (reference **SCA Packaging –v- Boyle** [2009] ICR 1056, SC and the Guidance at C2)

29. An effect is substantial where it reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. It must be "more than minor or trivial" (see **Goodwin** above with regard to the meaning of 'substantial' under section 1) or be "of substance" (see **Jones –v- Post Office** [2001] IRLR 384, CA with regard to the meaning of 'substantial' as part of a justification defence).

30. The assessment of whether a person is a disabled person must be at the relevant time of the decision complained of on the basis of the information prevailing at the time. When assessing whether the condition was likely to last more than 12 months account should not be taken of events that post-date the alleged unlawful conduct (see **Richmond Adult Community College –v- McDougall** [2008] IRLR 227, CA).

Direct discrimination

31. Section 13 of the Equality Act 2010 provides:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

32. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

33. A Tribunal may not make findings of direct discrimination save in respect of matters found in the originating application. A Tribunal should not extend the range of complaints of its own motion (**Chapman –v- Simon** [1994] IRLR 124, CA, per Peter Gibson LJ at para 42).

Discrimination arising from disability

34. Section 15 of the Equality Act 2010 provides:
"(1) A person (A) discriminates against a disabled person (B) if -

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

35. In **Williams –v- Trustees of Swansea University Pension & Assurance Scheme** [2017] EWCA 1008 (Civ) the Court of Appeal endorsed the decision of

the EAT, which confirmed that 'unfavourable treatment' was different from 'less favourable treatment' and is to be measured in an objective sense.

36. When considering a proportionate means of achieving a legitimate aim, the Tribunal will assess whether the aim is legal and non-discriminatory, and one that represents a real, objective consideration and if the aim is legitimate, whether the means of achieving it is proportionate including whether it is appropriate and necessary in all the circumstances.

37. As confirmed in the Supreme Court in **Homer –v- Chief Constable of West Yorkshire Police** [2012] UKSC 15:

> "As Mummery LJ explained in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:
>
> ". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. . . . First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"
>
> As the Court of Appeal held in *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The Tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.
>
> . . . To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so".

Reasonable adjustments

38. Sections 20 to 21 of the Equality Act 2010 set out provisions relating to the duty to make reasonable adjustments:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter

in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

. . . (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

1.	*Part of this Act*	2.	*Applicable Schedule*
3.	Part 5 (work)	4.	Schedule 8

21 **Failure to comply with duty**

a. A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

b. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

c. A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

39. Schedule 8 provides:

SCHEDULE 8
Work: reasonable adjustments
Part 1
Introductory
Preliminary

This Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part of this Act.

2 The duty

a. A must comply with the first, second and third requirements.

b. For the purposes of this paragraph—

i. the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of A;

ii. the reference in section 20(4) to a physical feature is a reference to a physical feature of premises occupied by A;

iii. the reference in section 20(3), (4) or (5) to a disabled person is to an interested disabled person.

c. In relation to the first and third requirements, a relevant matter is any matter specified in the first column of the applicable table in Part 2 of this Schedule.

Part 2
Interested disabled person

4 Preliminary

An interested disabled person is a disabled person who, in relation to a relevant matter, is of a description specified in the second column of the applicable table in this Part of this Schedule.

5 Employers (see section 39)

d. This paragraph applies where A is an employer.

5.	*Relevant matter*	6.	*Description of disabled person*
7.	Deciding to whom to offer employment.	8. 9.	A person who is, or has notified A that the person may be, an applicant for the employment.
10.	Employment by A.	11. 12.	An applicant for employment by A. An employee of A's.

40. The Equality and Human Rights Commission has produced a Code of Practice on Employment (2011) ("the Equality Code"). The Code of Practice does not impose legal obligations, but provides instructive guidance. The Tribunal has referred itself to the Code as appropriate. This has been taken into account by the Tribunal. For example, the Equality Act 2010 no longer lists factors to be considered when determining reasonableness, but these factors appear in the Code of Practice (paragraph 6.28). However, it will not be an error of law to fail to consider any of those factors. All the relevant circumstances should be considered.

41. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination (**Archibald v Fife Council** [2004] IRLR 651, HL).

42. The test of reasonableness is an objective one.

43. A failure to consult is not of itself a failure to make a reasonable adjustment (see **H M Prison Service & Johnson** [2007] IRLR 951, EAT).

44. The correct approach to assessing reasonable adjustments is addressed in **Smith –v- Churchills Stairlifts plc** [2006] IRLR 41; **Environment Agency –v- Rowan** [2008] IRLR 20; and **Project Management Institute –v- Latif** [2007] IRLR 579.

45. In **Smith**, the comparative exercise required by s.6(1) of the DDA was considered by the Court of Appeal having regard to the speeches contained in the judgment of the House of Lords in **Archibald**. Maurice Kay LJ stated:

> ". . . Notwithstanding the differences of language, it would be inappropriate to discern a significant difference of approach in these speeches. . . it is apparent from each of the speeches in **Archibald** that the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements".

46. The EAT in **Leeds Teaching Hospital NHS Trust –v- Foster** [2011] EqLR 1075 emphasised that when considering whether an adjustment is 'reasonable', it is sufficient for a Tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage and that there does not have to be a 'good' or 'real' prospect of that occurring.

47. With regard to knowledge the EAT in **Secretary of State for the Department of Work and Pensions v Alam** [2009] UKEAT 0242/09 held that the correct statutory construction of s 4A(3)(b) involved asking two questions: (1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then (2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is also 'no', there is no duty to make reasonable adjustments.

48. The Court of Appeal in **Matuszowicz –V- Kingston Upon Hull City Council** [2009] IRLR 288 held that there may breaches of the duty to make reasonable adjustments "due to lack of diligence, or competence, or any reason other than conscious refusal".

Indirect discrimination

49. Section 19 of the Equality Act 2010 provides:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim".

50. Disability is a relevant protected characteristic.

51. The Supreme Court in **Essop -v- Home Office (UK Border Agency)** [2017] UKSC 27 identified six main features in indirect discrimination claims: (i) there is no express requirement for an explanation of the reasons *why* a particular PCP puts one group at a disadvantage when compared with others; (ii) direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual; (iii) the reasons why one group may find it harder to comply with the PCP than others are many and various; (iv) there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage; (v) it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence; and (vi) it is always open to the respondent to show that his PCP is justified.

52. See above regarding a proportionate means of achieving a legitimate aim.

Harassment

53. Section 26 of the Equality Act 2010 provides:

"(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive

environment for B.. .

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are - . . . disability"

54. The motive or intention on behalf of the alleged harasser is irrelevant (see **Driskel** above).

55. The Court of Appeal confirmed in **Land Registry –v- Grant (Equality and Human Rights Commission intervening)** [2011] ICR 1390 "when assessing the effect of a remark, the context in which it is given is always highly material".

56. In **Richmond Pharmacology –v- Dhaliwal** [2009] ICR 724 the EAT held that the Claimant must have felt or perceived his or her dignity to have been violated. The fact that a Claimant is slightly upset or mildly offended is not enough.

Victimisation

57. Section 27 of the Equality Act 2010 provides:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
B does a protected act, or
A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

58. Causation is shown where the protected act materially influences (in the sense of being more than a trivial influence) the employer's treatment of the Claimant (see for example **Fecitt -v- NHS Manchester** [2012] ICR 372, CA on protected disclosures which adopted general discrimination principles). See also **Villalba –v- Merrill Lynch & Co Ltd** [2006] IRLR 437 where the EAT held with reference to **Igen** (above), if a discriminatory influence is not a material influence or factor, then it is trivial.

59. The EAT in **The Chief Constable of Kent Constabulary -v- Bowler** [2017] UKEAT/0214/16 gave guidance on detriments in victimisation claims:

> "Determining whether the treatment that B is subjected to amounts to a detriment involves an objective consideration of the complainant's subjective perception that he or she is disadvantaged, so that if a reasonable complainant would or might take the view that the treatment was in all the circumstances to his or her disadvantage, detriment is established. In other words, an unjustified sense of grievance does not amount to a detriment; the grievance must be objectively reasonable as well as perceived as such by the complainant".

Burden of Proof

60. The burden of proof reversal provisions in the Equality Act 2010 are contained in section 136:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision".

61. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, on a balance of probabilities there must be facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If there is a *prima facie* case, then the burden of proof falls upon the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

62. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

63. The Court of Appeal in **Madarassy** above, held that the burden of proof does not fall upon the employer simply on there being established a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.

64. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

65. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [*Igen* and *Madarassy*] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other."

66. The approached set out in **Hewage** was endorsed and applied to the Equality Act 2010 burden of proof reversal provisions by the Court of Appeal in **Ayodele –v- Citylink** [2017] EWCA (Civ) 1913.

67. The Tribunal has also taken fully into account all the authorities cited in the submissions from the parties.

Facts and associated conclusions

68. The Tribunal has carefully considered all of the evidence, submissions and authorities in detail. The Tribunal has endeavoured to give the parties a fair account of why they have won or lost, as the case may be, but if the Tribunal has not set out any matter in these reasons it is not to be concluded that it has failed to take it appropriately into account.

Disability

69. The Claimant relies upon three disabilities: Cancer; Depression/Anxiety; and Hypertension. It is accepted by the Respondent that the Claimant was a disabled person at all material times with regard to the Cancer condition. The other two alleged disabilities are disputed.

70. With regard to the disability of Depression/Anxiety, the Respondent admits that the condition as cumulatively referred to by the Claimant as Depression/Anxiety and Stress at Work did amount to a disability, but only from April 2016.

71. The Respondent contends that the stress at work issue did not arise until April 2015, at no period was it confirmed likely to last for 12 months or more and therefore did not satisfy the section 6 Equality Act 2010 definition until that period had expired in April 2016.

72. In an Occupational Health report produced on 24 March 2015, the Claimant reported that he recently commenced treatment for Hypertension and perceived he had Stress at work.

73. The Claimant produced Fitness for Work certificates from his GP dated 14 and 20 April 2015 confirming a condition of Stress at work and that condition was also confirmed in subsequent Occupational Health reports dated 25 June, 27 July and 14 August 2015.

74. That series of documents is consistent with the medical expert report of Dr Timothy Brow who confirmed at the conclusion of his report that as at 27 June 2017 the Claimant had a diagnosis of, amongst other things, Depression and Anxiety and that these had been present since 2015. The narrative at the outset of the Report confirms that the earliest date that work Stress had been diagnosed was 14 April 2015 with Anxiety and Depression appearing to be first diagnosed on 17 August 2015, as also confirmed in a Fitness for Work certificate dated 17 August 2015 at page 568 in the bundle, which details the condition at that time as being "anxiety with depression related to work related stress".

75. There was no evidence before the Tribunal of any medical expert confirming that the Claimant's conditions were likely to last for 12 months or more during the early stages.

76. Therefore, the Tribunal concludes that the Claimant potentially falls under section 6 of the Equality Act in respect of the Stress condition from 14 April 2016 and the Anxiety and Depression conditions from 17 August 2016, subject to the conditions having a substantial adverse effect on the Claimant’s normal day-to-day activities during at least that period.

77. In that regard, there is a reference to the Claimant having panic attacks at page 1460 of Dr Brow’s Report, which occurred in August 2015 and in respect of which the Claimant received cognitive behavioural therapy.

78. In the conclusions of his Report at paragraph 297, Dr Brow itemises all of the Claimant's conditions, the majority of which are not pleaded as disabilities in this case, and then states what the effects those conditions had, or would have had on the Claimant’s normal day-to-day activities without the Claimant taking medication, but unfortunately does not cross-reference those effects to the particular condition, or state when they occurred.

79. On balance, given the Respondent's acceptance in submissions that Anxiety/Depression/Stress amounted to a disability from April 2016, it follows that admission must also be that the condition/conditions had a substantial adverse effect on the Claimant's day-to-day debt activities during that initial twelve-month period.

80. The only matter under challenge by the Respondent is whether or not there was a likelihood that such circumstances would have lasted for more than 12 months at any time prior to April 2016.

81. In any event, the Tribunal concludes that the Claimant's conditions of Stress/Anxiety/Depression did have a substantial adverse effect on the Claimant's normal day-to-day activities from the date of the diagnosis, particularly with regard to the reference to panic attacks in August 2015 that required treatment. Also, the Claimant's difficulty in sleeping is set out at pages 1407/8 at paragraphs 20 and 28.

82. The Claimant's Hypertension condition appears to be first diagnosed in January 2015. The Occupational Health report of March 2015 states that the Claimant had Hypertension for two months. As with the other disputed conditions there is no evidence on likelihood of continuance and therefore this condition potentially falls under section 6 as at January 2016.

83. The Tribunal concludes that it has no persuasive evidence that the Claimant's Hypertension condition had a substantial adverse long-term effect on his day-to-day activities.

84. Dr Brow addresses in part the Claimant's Hypertension condition, in particular at pages 1453, 1471, 1473, and 1474 with regard to dizzy spells. Therefore, the medical position appears to be the Claimant had Hypertension at sometime in early 2015, which the medical evidence suggests was controlled save for potential dizzy spells recorded in June 2017. The only evidence on the deduced effects of the Claimant's condition appears to be in paragraph 2.6 of his impact statement where he refers to "a daily spike of high blood pressure causing his heart to beat uncontrollably, feeling dizzy and lightheaded" despite the medication provided.

85. However, the Tribunal has no corroborative medical evidence from that period to confirm that state of affairs and in particular it is not recorded in the helpful chronology provided by Dr Brow starting at page 1406. It is mentioned obliquely in Dr Brow's Report, but relates to a period in June 2017. The most detail is provided in the Claimant's impact statement at paragraph 2.6, but there is no medical evidence to corroborate the Claimant's contention that he had a daily spike in blood pressure causing is heart to beat uncontrollably.

86. Bearing in mind the Claimant reported to his GP a more minor fracture but not these instances, the Tribunal is not persuaded that this symptom occurred as alleged. The Tribunal concludes the Claimant would almost inevitably have mentioned it to his GP and the Respondent's Occupational Health doctors at some point in time from early 2015 onwards. The burden of proof is on the

Claimant to show that he falls within section 6 and the Tribunal concludes he has not discharged that burden with regard to the Hypertension condition.

87. Therefore, in conclusion, the Tribunal and reaches a view that the Claimant was clearly a disabled person with regard to the Cancer condition and also was a disabled person from April 2016 with regard to Depression, Anxiety and Stress, but has not proved he fulfilled the definition with regard to the Hypertension condition.

Unfair constructive dismissal

88. The Tribunal refers to the events relied upon at paragraph 16 a to jj in so far as they were not withdrawn by the Claimant (those withdrawn were e, k, p, u, v, w, cc, and dd).

(a) On 04 March 2015, Edith Adejobi said to the Claimant "I will come down with a heavy foot whenever I am not satisfied with compliance":

89. Ms Adejobi commenced work as the Claimant's line manager on 02 March 2015 when she was appointed to the role of Interim Assistant Director of Serious Incidents and Complaints for the Respondent.

90. As part of her introduction to the position, Ms Adejobi decided to hold one-to-one meetings with each member of staff. On 04 March 2015 Ms Adejobi held a one-to-one meeting with the Claimant during which there was a discussion about the outstanding caseload, Ms Adejobi's intention was that the most overdue complaints would be targeted and in respect of which there would be a consistent approach.

91. The Claimant alleges that Ms Adejobi said to him as part of that discussion: "I will come down with a heavy foot whenever I am not satisfied with compliance". Ms Adejobi denies she used that phrase.

92. The Tribunal received evidence from Ms Michelle Davis who confirmed that on that day the Claimant went downstairs into the office where she was sitting, was very flustered and said something to the effect that he could not believe that Ms Adejobi had threatened him and had said that she would come down on him with a heavy foot.

93. Ms Dibben confirmed in her evidence that when she interviewed Ms Adejobi as part of the investigation into the subsequent bullying and harassment complaint Ms Adejobi had said: "She was not sure those were the exact words and that in her one-to-one meetings with the new team she was clear about her expectations in terms of work requirements of the job role and basically that she would pick up with team members if they were falling short of their expectations". That is reflected in the resulting Investigation Report, which concludes at page 1125: "EA was asked about the coming down with a heavy foot comment. She said this was taken out of context and that she did expect the complaints team to do their job roles, would be supportive but would also deal with any issues if and when they arose".

94. The Tribunal concludes that Ms Adejobi did use a comment the same, or similar, to the one alleged. The Tribunal also finds that it was a comment made generally about compliance and her managerial expectations.

95. The Tribunal concludes that of itself, this matter does not amount to a fundamental breach of contract. It cannot properly be described as conduct calculated or likely to breach trust and confidence.

(b) Edith Adejobi ignored the Occupational Health advisor's recommendations made on 23 March 2015:

96. The Respondent obtained an Occupational Health report dated 24 March 2015 (page 459 of the bundle). It advised that: "a stress related risk assessment is carried out under the Trust mental health guidance on stress management". There was also a recommendation in the Report for the monthly one-to-one meetings to address the Claimant's concerns to support his health, well-being and flexibility with medical appointments.

97. Although the Occupational Health report is dated 24 March 2015, it was Ms Adejobi's evidence that she did not receive it until sometime during the week commencing 06 April 2015, whereupon she booked a one-to-one meeting to discuss the Occupational Health advice with the Claimant, to be followed by a risk assessment on 14 April 2015, as evidenced by a screenshot of Ms Adejobi's Outlook page. However, events relating to the Claimant's attendance at a hospital appointment on 10 April intervened and the Claimant was off work through sickness absence and did not return until after Ms Adejobi ceased to be responsible for his line management.

98. The Tribunal has also been referred to Ms Adejobi's supplementary statement after this matter arose in evidence and an email that she sent to Ms Pithouse and Ms O'Donovan dated 9 April 2015 stating: "I have a 1:2:1 with Hakeem next Tuesday. I hope to carry out the normal supervision session and then the follow-on with the stress audit".

99. The Tribunal concludes that Ms Adejobi did receive the Occupational Health report in the week commencing 06 April 2015 and had arranged a time to hold a risk assessment with the Claimant, but his absence due to sickness intervened. Ms Adejobi did not ignore the Report as alleged.

100. The Tribunal concludes that this matter does not amount to a fundamental breach of contract.

(c) The Claimant's complaint of 23 June 2015 regarding his reduction in pay was not addressed:

101. The Claimant's complaint of 23 June 2015 is at page 510 of the bundle and relates to the Claimant's absence from work on 10 April 2015. On that date the Claimant had an inpatient appointment at St George's Hospital and notified Ms Adejobi of that fact in an email dated 07 April 2015 at page 462 of the bundle, It

states: "I would like to inform you that I shall not be in the office on Friday 10th of April 2015, as I have an inpatient hospital appointment". The e-mail importance is flagged as being 'high'.

102. The attendance at hospital related to the Claimant's Cancer condition.

103. The Claimant did not receive any reply to that email which the Tribunal finds had been received by Ms Adejobi.

104. The Claimant did not record his prospective absence in the Respondent's 'e-roster' system.

105. On 20 April 2015 Ms Adejobi sent an email to Ms Dibben at page 478 of the bundle stating: "RE stopping of pay for unauthorised absence: Do I have to formally notify the members of staff concerned about the stoppage and also reasons? If they do hand in a sick note that at this stage, when I have to accept or point to the Trust policy, refusing to reinstate pay?" To which Ms Dibben replied: "it is best to write to them/email them if you are stopping pay yes and the reason why and then advise them that is in line with the sickness policy".

106. Also in an email dated 28 April 2015 Ms Adejobi asked Ms Dibben: "Should I also then send a letter to his home advising that he was not paid for the day of his inpatient procedure as I was advised by email on a Tuesday following the bank holiday when I was on leave and so received two days' notice of his intention not to be in work for a procedure that he must have known was taking place in good time. In addition, I was not given a copy of the appointment letter (or given sight of the letter), and have also marked him down as AWOL on the Monday before the sicknote as he has not provided a certification". There is no documented reply in the bundle.

107. The Claimant noticed on 26 May 2015 that he was missing a day's pay from his salary. He raised the matter in a letter to Ms Adejobi dated 23 June 2015 at page 510 and received a reply by letter dated 02 July 2015 at page 520. Ms Adejobi confirmed that she would reinstate the Claimant's pay from 25 June which was when she received the Claimant's letter of 23 June 2015. The letter does not address the deduction on 10 April 2015.

108. Paragraph 14 of the Respondent's Sickness Policy entitled "Medical and Dental Appointments" provides: "There is no general entitlement to paid time off for planned dental and medical appointments. Where possible managers should allow staff to work back time for such appointments or, alternatively, take annual leave. Appointments should be scheduled to avoid disruption wherever possible. Some reasonable paid time off can be granted to staff with a disability for rehabilitation, assessment or treatment in connection with their disability. Paid time off is granted to pregnant staff antenatal appointments. Staff who are entitled to paid time off are required to provide written confirmation of appointments and should be arranged, as far as possible, to minimise disruption to the normal working day".

109. The Tribunal concludes that on a natural reading of clause 14, where it refers to providing written confirmation of appointments, it means an appointment letter or similar rather than just email confirmation by the employee.

110. Under the section entitled 'Procedure for Reporting Sickness Absence' paragraph 3.9 provides: "It is the employee's responsibility to comply with the sickness notification rules. If sickness certificates are submitted late, without a reason satisfactory to the Trust, pay will be reinstated only from the date the certificate is received by the line manager or other delegated authority".

111. The Tribunal concludes that on a natural reading of the Sickness Policy the Medical and Dental Appointments clause is a stand-alone matter and is not governed by the procedure for reporting sickness absence that is set out earlier within the Policy. The Tribunal reaches this conclusion for two reasons. First, the 'medical and dental appointments' section is addressed separately after the procedure section and refers internally to its own process of supplying written confirmation of appointments. The procedure for reporting sickness absence expressly relates to matters such as self-certification forms and periods of actual sickness, as opposed to simply attending at a medical or dental appointment.

112. The Tribunal is therefore led to conclude that there does not appear to be any express authorisation in the Sickness Policy to deduct pay from an employee for not complying with the very few procedural requirements set out in paragraph 14.

113. Paragraph 14, again on a natural reading, provides management with an option to refuse attendance at the medical/dental appointment, or refuse time off with pay, on the ground that such appointments should be scheduled as far ahead as possible to minimise disruption to the normal working day. Provided advance notification is given the process can be managed to minimise disruption and possible arrangements made for the employee to work back time or take annual leave where pay for time off is not granted. However, the sickness absence procedure relates to managing matters after the event in that the employee goes off work through sickness and then has to report that sickness retrospectively to the Respondent. Paragraph 3.4 regarding deduction of pay is a management tool in respect of failing to comply with sickness absence procedures.

114. The Tribunal also finds that whereas paragraph 14 requires staff who are entitled to paid time off to provide written confirmation of appointments, it does not stipulate when that written confirmation needs to be provided. It does not stipulate that the written confirmation of an appointment necessarily needs to be provided in advance of the appointment itself. If a manager requires such evidence in advance of the appointment and it is not provided there is the power to refuse attendance at the medical appointment itself, or time off with pay.

115. The reason given by Ms Dibben and Ms Adejobi for the deduction pay relating to 10 April 2015 is that they both considered that the Claimant had not

complied with paragraph 14 and that, therefore, paragraph 3.4 allowed a deduction in pay for unauthorised absence.

116. Ms Adejobi's evidence was that that the Claimant was choosing not to follow the procedure which was to book the appointment on the e-roster (the same way as he should book annual leave) and show her a copy of the appointment letter.

117. Ms Adejobi's evidence was that she treated it as absence without leave as she did not know the reason for the Claimant's absence from the office at that time. Her oral evidence was: "I didn't know he had a medical appointment. He had not recorded a sickness absence and I had no evidence he had a medical appointment". However, the Tribunal refers to Ms Adejobi's email to Ms Dibben above where she sates that she only received two days' notice of the appointment. Therefore, she must have received the e-mail notification in advance and that e-mail referred to a hospital appointment.

118. Also, in her witness statement at paragraph 30 Ms Adejobi states: "On 07 April 2015, when I was not in the office Mr Shittu emailed me to advise he would not be in the office at all on 10 April as he had a hospital appointment".

119. Ms Adejobi also states at paragraph 30: "Whilst I have no issue with Mr Shittu being absent to attend a hospital appointment there was no indication why he could not attend work either before or after the appointment. Nor did he explain why he had not informed me or his previous manager of this pre-booked appointment before this late stage". In paragraph 31: "On 10 April 2015 Mr Shittu did not attend work. I waited his return to work to discuss the process of such appointments and to ask him to produce something to confirm the hospital appointment. However, Mr Shittu did not attend work at all. Whilst Mr Shittu had advised that he had a hospital appointment that day for a procedure he did not provide a copy of any appointment letter or medical note covering this day. As such, I subsequently recorded the day as unauthorised absence".

120. Therefore, the oral and written evidence of Ms Adejobi does not appear consistent on this point.

121. Ms Dibben stated in her witness statement at paragraph 25: "Ms Adejobi was asked to talk is through the stoppage of pay on 10 April 2015. Ms Adejobi explained that it was her expectation that Hakeem Shittu would speak to her about any time required for any medical or hospital appointment and to provide her with the necessary evidence of such appointments. She said that what had happened was that he had not spoken to her at all but left a voicemail message at 7am saying that he was not coming in. She said that she had no way of contacting Hakeem Shittu and a late notification meant she would not been able to make any cover arrangements for work. Ms Adejobi said that she had never seen any evidence of a hospital appointment for that day and therefore recorded him as unauthorised and unpaid. Hakeem Shittu did produce for the investigation team a copy of his hospital letter and which was dated 27 March 2015 meaning he could have spoken to his line manager prematurely about needing time off and discussing how this was to be taken or made up."

122. Ms Dibben accepted in cross-examination that it was good practice that before withholding pay the employee should be informed. Ms Dibben's oral evidence was that the advice she gave to Ms Adejobi was that there should be a conversation with an employee before their pay is stopped. That advice was not followed.

123. Ms Adejobi's evidence was that the approach of employees in her team to sick leave had deteriorated to the extent where, in her view, it was considered an extension of annual leave. Members of staff would be absent at short notice and leave information on the work's voicemail early in the morning when no one was in the office to receive the call. Ms Adejobi would then be unaware of the nature of the absence, or how long the employee might be absent, which made it difficult to manage work, distribute work fairly, or facilitate meetings. Ms Adejobi also thought there was a problem with annual leave being booked without cover arrangements to the extent that in March 2015 she considered there was not a single day when every team member was at work.

124. Her evidence was that she raised the issue of procedures for taking sick leave and absence through medical appointments at a team meeting on 11 March 2015 in respect of which there are meeting notes starting at page 447 of the bundle. Agenda item 8 addresses annual leave, but there is no mention of sickness leave. Ms Adejobi's evidence was that the matter had been discussed but had not been recorded. There was no follow up e-mail to the team.

125. There was a subsequent meeting on 30 April 2015 (notes in volume 5 at page 259) where the notes refer again to annual leave and state that Ms Adejobi would input sickness data into e-rostering following receipt of self-completed certificates and return to work meetings, and Ms Davis referred to the Sickness Policy. There is no express mention in those notes of the Sickness Policy reference to "provide written confirmation of appointments" for medical and dental appointments (see page 132).

126. The Claimant denies that anything was mentioned in the team meeting of 11 March 2015. The Claimant also argues that there had been no requirement prior to Ms Adejobi commencing as his line manager for any member of staff to produce the actual doctor's appointment letter.

127. Ms Adejobi's evidence was she had worked in NHS Trusts for 15 years and had not worked anywhere where that process did not take place.

128. The Outlook diary entry at page 469 does not take matters further. It was not clear from the evidence who had made the entry and it does not address the issue of written confirmation of the appointment

129. The Tribunal concludes that the Claimant and the team immediately prior to Ms Adejobi taking over as manager did not provide medical evidence of appointments, which confirms in part Ms Adejobi's evidence of the level of self-management within the team at the time she took over.

130. The Tribunal finds on balance that the requirement for appointment letters to be produced for medical attendances was not confirmed at the meeting on 11 March or 30 April 2015.

131. Ms Adejobi could have simply sent a quick reply to the Claimant when she received his email notifying her of his medical appointment to ask for documentary evidence. However, her oral evidence was that she did not consider that to be her role as it was the employees who had to provide that information.

132. The matter was raised as part of the Claimant's bullying and harassment complaint and Ms Dibben stated in the interview meeting as part of that process on 16 November 2015 that she would "look into it" (page 745). In the meeting on 06 January 2016 the matter is further discussed and the Claimant offered the medical appointment confirmation and Ms Dibben told the Claimant that the document would not be put in the pack of documents, but she would have receipt of the written confirmation as it would be "useful for reinstating that day of pay" (page 874). The matter was raised again in the bullying and harassment complaint outcome meeting on 25 February 2016 (page 1069).

133. Ms Dibben confirmed in oral evidence that the meeting note at page 874 gave the impression that pay would be reinstated and that she did not get back to the Claimant on this matter. Her oral evidence was that: "I think I did say likely to be reinstated". In the bullying and harassment complaint outcome meeting there is an exchange about sickness and the withholding of pay, but the Tribunal finds that this discussion was about the circumstances relating to Ms Davis as demonstrated by the Investigation Report at page 1119. The Investigation Report does not address the 10 April 2015 deduction from pay (see page 1127).

134. The Tribunal concludes on balance that the Respondent did fail to address the Claimant's complaint about the 10 April 2015 deduction from pay. The Tribunal concludes that even if the Respondent was entitled to deduct pay from the Claimant's salary for his hospital attendance on 10 April 2015 on the basis that there is no general entitlement to paid time off for planned medical appointments and it was not regarded as reasonable paid time off granted to the Claimant for treatment in connection with his disability under paragraph 14 (which will be addressed later with regard to the disability discrimination claims), the Tribunal concludes that the Respondent had not given the Claimant an opportunity of working back time or taking annual leave. Further the Claimant was not informed in advance that the deduction would be made despite advice being given to Ms Adejobi in that regard. Further, Ms Dibben stated that the deducted pay was likely to be reinstated, but then failed to address the matter. While not being matters that were 'calculated' to damage or seriously destroy the relationship of trust and confidence, the Tribunal concludes that even though the deduction was a relatively modest amounting of a day's pay, the fact that it was connected with the Claimant's Cancer-related Hospital inpatient attendance was in all the circumstances conduct without reasonable and proper cause likely to have that effect. As it is a breach of the implied term, it is automatically a fundamental breach.

135. The Tribunal further concludes that this matter amounts to a fundamental breach of contract as it finds below that it also amounts to discrimination arising from disability and a failure to make a reasonable adjustment. Unlawful discrimination breaches the implied term of mutual trust and confidence.

(d) On 08 April 2015 Edith Adejobi instructed the Claimant to take on more work despite his protestation and reliance on his ill health:

136. The email chain relating to this matter starts at page 467 and moves through to 464 and demonstrates the Claimant's reluctance to do what Ms Adejobi considered to be reasonably straightforward and not time-heavy tasks. The Tribunal agrees with her assessment. The Tribunal particularly refers to Ms Adejobi's e-mail to the Claimant of 09 April 2015 at page 464. Ms Adejobi confirmed to the Claimant that she was willing to support him in managing his time to undertake these tasks, which the Tribunal accepts was unlikely to take any longer than half an hour. Ms Adejobi had undertaken some of Ms Davis' work herself, which had alleviated some of the overall work to be done. The Claimant's evidence was that this matter also related to historic issues over workload that did not involve Ms Adejobi.

137. The Tribunal concludes that Ms Adejobi reasonably managed the circumstance and it does not amount to a fundamental breach of contract.

(f) Edith Adejobi failed to contact the Claimant during the first eight weeks of his sickness absence and did not agree any keeping in touch arrangements:

138. The Claimant was signed off work by his GP on 14 April 2015 with the condition of "work stress". He was signed off for a further four weeks on 23 April 2015, and another four weeks from 20 May 2015 with the condition of "stress at work".

139. It is accepted by Ms Adejobi that she did not contact the Claimant during the first eight weeks of his sickness absence. Ms Adejobi's evidence was that the Claimant had only initially signed off for two weeks and expected him to return to work imminently. When that period extended she wanted to give him some time before making contact.

140. Ms Adejobi contends that she did not have the Claimant's phone number because it was not on his employment record. The Tribunal concludes that it was easily obtained from HR. Ms Adejobi states in her witness statement: "I felt that he had been resisting my efforts to manage him and while initially I did not think efforts to contact him will help things at that point, I felt that it got to the stage he had been off a significant period and it was not apparent he would be coming back". As a consequence, Ms Adejobi made an Occupational Health referral.

141. The Claimant did not contact Mr Adejobi during this eight-week period, save for providing the fitness for work certificate.

142. The Sickness Policy provides at paragraph 3.1 relating to sickness absence: "Employees should expect to receive personal telephone calls from their line manager during any period of sickness absence both for support and update on the sickness absence situation".

143. Paragraph 3.4 gives the Respondent authorisation to deduct pay as set out above.

144. Paragraph 3.9 provides that "It is the employee's responsibility to comply with the sickness notification rules. If sickness certificates are submitted late, without a reason satisfactory to the Trust, pay will be reinstated only reinstated from the date that the certificate is received by the line manager or other delegated authority".

145. Paragraph 5.7 provides that: "It is of paramount importance that the line manager maintains contact with their employee on long-term sickness. Contact arrangements are to be agreed at the start of the sickness absence in line with the reporting arrangements for the management of short-term absence above".

146. Sickness is classed as long-term under the provisions of the Respondent's policy after a continuous absence of 21 calendar days or more. Although there is some contact by Ms Adejobi with Ms Dibben subsequent to the Claimant's commencement of this period of sick leave, that correspondence was principally concerned with a deduction from pay and when to notify the Claimant. There does not appear to have been any conversation with Occupational Health over advice on whether or not to contact the Claimant while he was off work through stress.

147. Although the Tribunal can understand why initially Ms Adejobi considered the absence to be short-term and may have been reluctant to contact an employee who is off work with work related stress and who she considered had been resisting her efforts to manage him, there comes a reasonable time when contact needs to be made in order to achieve what the Sickness Policy envisages of providing support and to update on the sickness absence situation. Ms Adejobi could have referred the issue of contacting the Claimant to HR if she considered it would create a problem if she personally contacted him.

148. The Tribunal concludes that in delaying for a period of eight weeks before contacting the Claimant, Ms Adejobi acted without reasonable and proper cause and again although the Tribunal concludes that Ms Adejob's inaction was not calculated to seriously damage trust and confidence, the Tribunal concludes that it was likely to do so.

(g) On 15 June 2015, Edith Adejobi told the Claimant to contact her every Monday at 10am during his sickness absence:

149. On 15 June 2015 in a letter at page 508 of the bundle, Ms Adejobi notified the Claimant that under the Trust's Sickness Policy there was an obligation on the employee to make regular contact with their manager and that regular

conversations should occur during sickness. Ms Adejobi then stated: "Therefore I will be grateful if you contact me each Monday at 10.00am on my landline during your absence. In the event you feel you're not able to do this, you should discuss this with Occupational Health during your meeting next week in order that they can suggest an alternative means of keeping in touch throughout your absence". The Claimant was also asked to complete a stress assessment document to assist Occupational Health.

150. It should be noted that the referral to Occupational Health by Mr Adejobi at this stage was done without the Claimant's consent and by a letter dated 23 June 2015, at page 510 of the bundle, the Claimant contested Ms Adejobi's reference to the Sickness Policy and an obligation on the employee to make regular contact. Ms Adejobi replied by letter of 02 July 2015 (page 520) disagreeing with the Claimant's interpretation and stating that as an employee he was required to keep her informed during his absence and again asked him to call her each Monday at 10.00am stating: "I will ensure I am available to take your call. It is important that we talk during your absence in order that I can support you and ensure that your return to work is a positive experience when the time comes". Ms Adejobi stated: "I can confirm that I will reinstate your pay from 25 June (when we received the letter)".

151. In an email dated 30 June 2015, Ms O'Sullivan, Senior Specialist Nurse Advisor, confirmed to Ms Adejobi that she had received contact from the Claimant and stated: "I forgot to add to the OH report and suggest that in order to support his mental well-being at this time, he is able to contact another member of the team (rather than you directly) in order to report on Monday morning at 10.00am. Is it possible for the Claimant to liaise with the Business Manager to the Director of Nursing to provide her with regular updates?". That point is not addressed in Ms Adejobi's letter to the Claimant of 02 July. The email exchange at page 518C confirms that at the time the letter was read by the Claimant on 02 July, Ms Adejobi had not spoken to Ms O'Sullivan. Therefore, it appears the only information Ms Adejobi had available was that contained in the email of 30 June.

152. By an e-mail to Ms Dibben dated 09 July 2015 Ms Adejobi stated: "Please find attached the letter I received from OH following HS's receipt of the letter requesting a weekly phone contract. I have not responded to the letter as yet, but note in the interim that HS has not contacted me nor Brenda. I am also concerned about the tone of his letter and the subsequent OH response, given the fact that no allegations have been made directly to me or HR. I would be grateful for your urgent advice on this matter. I'm rather taken aback and almost feel that reverse bullying is taking place".

153. An e-mail from Ms Brenda Dawson, Senior Employee Relations Advisor, to Ms Adejobi dated 02 July 2015, at page 519, suggests that the 02 July letter was originally a draft by Ms Dawson as it has the ending comment: "Edith, I deliberately made the tone of these letters friendly and supportive, but if Monday comes and they fail to comply, we will have to go down the route of backing up these reasonable management instructions with the statement of

withholding pay if the failure continues". It is not known whether Ms Dawson knew of the advice from Ms O'Sullivan.

154. Although Ms Adejobi said in evidence that she subsequently spoke to Ms O'Sullivan about the matter in the week following, there is an email at page 529C of the bundle dated 06 July 2015 where Ms O'Sullivan said she had not yet received a response to her email. The Tribunal also cross-references page 525 and a letter to the Claimant dated 13 July 2015 in which Ms Adejobi says: "Following my letter of 02 July I was expecting you to call me on Monday morning". That communication post-dates Ms O'Sullivan's advice on 30 June 2015 regarding possible alternative points of liaison. Also, at page 529A there is an email from Ms O'Sullivan to the Claimant dated 16 July which states: "I sent Edith an email on 2 July and today to contact me to discuss and advise further. I've not heard from her".

155. Therefore, on balance the Tribunal concludes that Ms Adejobi did not contact and speak to Ms O'Sullivan after she sent the email notifying her of the amendment to the Occupational Health report and suggesting an alternative point of contact.

156. At paragraph 41 of Ms Adejobi's statement she says that did not receive a response from the Claimant regarding her 02 July 2015 letter at page 520 and therefore sent another letter by recorded delivery on 13 July 2015, at page 525 of the bundle. In this letter Ms Adejobi warned the Claimant that if he did not contact her by 10.00am on 15 July 2015, she would record the absence as unauthorised and unpaid and pay will continue to be withheld until the Claimant complied with the management instruction. The Claimant was told that any reinstatement of pay would not be backdated.

157. The Claimant declined receipt of this letter and it was returned. Ms Adejobi then wrote a further letter to the Claimant dated 23 July 2015 which states: "Despite writing to you on two occasions, reminding you of the need to keep in touch with me during your sickness absence, you continue to fail to comply with this reasonable management instruction. Therefore, I have instructed payroll to stop your pay from Monday, 20 July 2015. In the event that you comply with my instruction and call either Brenda Dawson, Senior Employee Relations Advisor or me, your pay will only be reinstated from that point. I understand that you have advised occupational health you cannot talk to me as by doing so you will compromise your health and well-being, however, neither I nor Brenda are aware of any complaint that you have made (whether formal or informal) and therefore we are at a loss to understand what the issue is. I would like to meet with you informally to discuss your continuing sickness absence and the reasons for you not complying with the policy. At this meeting it will be useful for us to explore the issues that have concerned Occupational Health in order that we can find a solution to them. . . Finally, please be aware that you will not be paid until you speak with Brenda or me, therefore I would urge you to do so on receipt of this letter".

158. By a letter dated 27 July 2015 the Claimant recorded his version of the content of a telephone call with Ms Dawson on the same date. The Claimant records:

"Finally you requested that I contact you at 11.00 am every Monday during my absence from work. I concurred that I am willing to contact you at the suggested time or anytime you wish if you are certain this is in line with Trust's policy . . .you advised me that you will contact Payroll to reinstate payment of my salary with effect from today 27 July 2015 but I pointed out it would be inappropriate and a miscarriage of justice . . . " (page 535).

159. A meeting was arranged by Ms Adejobi on 03 August 2015 with an offer for the meeting to be held at the Claimant's home or a mutually agreed neutral venue. The letter concludes "Finally, please be aware that you will not be paid until you speak with Brenda or me, therefore I would urge you to do so on receipt of this letter".

160. The Tribunal concludes that Ms Adejobi's request on 15 June 2015 for the Claimant to contact her every Monday was made before Ms O'Sullivan's addendum to Occupational Health report and is consistent with the Respondent's sickness policy.

161. By 02 July 2015 Ms Adejobi had the communication from Ms O'Sullivan, but did not offer the Claimant an alternative point of contact. The communication by Ms Adejobi on 13 July 2015 also did not provide the opportunity for the Claimant to contact an alternative person and at that time there is no indication that Ms Adejobi had contacted Ms O'Sullivan. It was not until Ms Adejobi's letter to the Claimant dated 23 July 2015 that the alternative contact of Ms Dawson on Mondays was offered and to which the Claimant agreed on 27 July 2015.

162. Therefore from 02 July 2015 to 23 July 2015 Ms Adejobi did not offer the Claimant an alternative point of contact when knowing of the Occupational health advice. The Tribunal concludes that the actions of Ms Adejobi in telling the Claimant to contact her every Monday and failing to provide an alternative point of contact might not be considered best practice in the circumstances, the Tribunal concludes that of itself it does not reach the high threshold of conduct without reasonable and proper cause that had the purpose or effect of destroying trust and confidence between the Claimant and the Respondent.

(h) On 02 and 13 July 2015, Edith Adejobi wrote to the Claimant stating that she required him to call her by 10am on 15 July 2015 and that a failure to do so would result in his absence being unauthorised and his pay being withheld until he complied with her management instruction:

163. It was the letter from Ms Adejobi of 13 July 2015 where this requirement was first stated (see above). However, the Claimant refused to accept the recorded delivery letter of 13 July 2015. Ms Adejobi sent a subsequent letter to the Claimant dated 23 July which confirmed she had instructed payroll to stop pay from 20 July 2015 which would only be reinstated from the time contact was made. Ms Adejobi provided the Claimant with the alternative of Ms Dawson as a point of contact, which the Claimant used.

164. The Tribunal concludes that the content of the letters by Ms Adejobi fell within the Sickness Policy provisions and were appropriate given the Claimant's lack of contact as requested (see below). The request in the circumstances was a reasonable management instruction. The Claimant failed to comply and had refused even to accept recorded delivery mail. The Tribunal concludes that in the circumstances the letters did not amount to a breach of the implied term.

(i) On 23 July 2015, Edith Adejobi wrote to the Claimant to advise him that she had instructed payroll to stop his pay:

165. Paragraph 3.1 of the Respondent's Sickness Policy under "Procedure for Reporting Sickness Absence" allows for reporting policies to meet local operational need and also provides that employees "should expect telephone calls from their line manager during periods of absence". Paragraph 3.2 provides that when absent from work a staff member should provide information on "arrangements to keep in touch".

166. Further the section addressing 'Management of Long Term Sickness Absence' provides at paragraph 5.2 that: "It is of paramount importance that the line manager maintains contact with their employee on long term sickness". Also that: "Contact arrangements to be agreed at the start of the sickness absence, in line with the reporting arrangements for the management of short term absence above", There are no express reporting arrangements under the Managing of Short Term Sickness Absence in section 4 and the Tribunal considers that the section on Procedure for Reporting Sickness Absence in section 2 clearly applies to short term absences as anticipated in the Policy.

167. The Tribunal concludes that Ms Adejobi's request for the Claimant to contact her at a regular time falls under the parameters of paragraphs 5.2 and although it did not occur at the start of the sickness absence (at that stage Ms Adejobi was unaware it was going to be a long-term absence), it still amounted to contact arrangements in line with the importance of a manager "maintaining contact with an employee on long term sick".

168. The Tribunal accepts that it was a local arrangement to meet operational needs for the Claimant to contact Ms Adejobi every Monday where he had been absent from work for eight weeks. Accordingly, any failure by the Claimant to comply with the managerial reporting arrangement could result in a deduction from wages under paragraph 3.4 of the Sickness Policy that allows for loss of pay due to unauthorised absence where an employee fails to report in line with the Policy provisions.

169. The Tribunal concludes that Ms Adejobi requesting the Claimant to contact her at regular times rather than her contacting the Claimant still falls within paragraphs 3.1 and 5.2 of the Sickness Policy. The Claimant was warned about a potential deduction in pay (see above). In the circumstances the Tribunal concludes that the communication of 23 July 2015 does not amount to conduct without reasonable or proper cause that was calculated or likely to destroy or seriously damage the relationship of trust and confidence.

(j) A failure to investigate either adequately or at all, the joint complaint submitted on 29 July 2015:

170. The group complaint was submitted in a letter dated 29 July 2015 starting at page 539 of the bundle. It was submitted by Winnell Bannister, Michelle Davis, Linh Sy and the Claimant. At internal page 3 of the joint complaint there are 35 separate identified complaints in bullet form. Receipt of that complaint was acknowledged by Dr Brimblecombe in a letter of 03 August 2015 stating that it had been passed onto employee relations for action, which would be by way of an informal/mediation approach initially in accordance with the Grievance Policy.

171. Ms O'Donovan wrote to the Claimant in a letter dated 07 August 2015 at page 557 of the bundle stating that she would like to meet with the Claimant as a preliminary measure in order to agree a way forward to resolve the complaint. A date was fixed and the Claimant was provided with the right to be accompanied.

172. The complainants wrote a joint letter to Dr Brimblecombe dated 11 August 2015 page 558 of the bundle which states: "It would appear that the approach to review this complaint informally under the Grievance Policy, in the first instance is inappropriate given the serious nature of the majority of issues raised, which relate to Bullying and Harassment. We therefore request this complaint should be formally investigated under the Bullying and Harassment policy".

173. A potential conflict of interest was also raised with regard to Ms O'Donovan and Ms Dawson on the basis that they had either been involved in this matter in an advisory capacity, or had previous involvement with the team during the period of the complaint. It is supported by the comment: "It is important to note that the Bullying and Harassment policy states that a manager with no previous involvement in the case will be appointed to investigate the matter".

174. Dr Brimblecombe replied to Ms Sy in a letter dated 13 August 2015 at page 561 stating: "I acknowledge receipt of the revised Bullying and harassment claim. I have noted their concerns about ensuring impartiality and, as a result, an independent ER advisor will be nominated to lead on it".

175. Following a period of sickness absence by the Claimant, Ms Dibben, Head of Employee Relations, wrote to the Claimant on 10 September: "In relation to the serious grievance that you other colleagues from the Complaints and Serious Incidents Team have raised in relation to your line management".

176. The letter confirms that Ms Pithouse and Ms Dibben had been asked by Dr Brimblecombe to investigate the issue and "although this is been submitted as a "collective grievance" Ms Dibben would like to meet with each member of the team on an individual basis to better understand the issues from an individual perspective".

177. The Claimant was invited to "an investigatory meeting" on 17 September 2015. The Claimant was given the right to be accompanied and the letter states:

"There are a number of things within your grievance for us to look at and once we have spoken to you individually will arrange a further meeting at a later stage in the investigation to speak with you as a team". Ms Dibben acknowledged the Claimant had been absent from work through sickness but believed that he was sufficiently well enough to attend the investigatory meeting.

178. The Claimant replied by a letter dated 12 September 2015 at page 581A of the bundle stating that he was not sufficiently well enough to discuss the issues as proposed and stated a preference that the initial meeting should include all the complainants being present and suggesting a further option of providing written questions and answers.

179. Ms Dibben confirmed in the letter of 18 September 2015 that the investigation meeting was rearranged for October and cross referred to the Occupational Health report in July which stated that the Claimant was fit enough to attend such meetings.

180. The letter states that "a true collective grievance" could only be presented to the Trust by a trade union representative and that until such complaint was received the investigation would continue with individual meetings as advised.

181. The Claimant attended at the meeting on 06 October and subsequently wrote a letter to Dr Brimblecombe on 08 October, page 607 of the bundle, complaining about being called to the meeting and the conduct of it: "Given the facts above, I have lost complete confidence in the trust handling this matter" and concludes: "I therefore find my participation in any meeting questionable given the current circumstances, unless this matter is objectively dealt with and the entire handling of the process to date reviewed and investigated externally".

182. Within the letter the Claimant states: "As an employee in a NHS Trust committed to promote equal opportunities to all individuals with clear policies on bullying and harassment, I am not assured, that this process has to date been conducted with equity, and ruling out discrimination".

183. Also, within the text of the letter the Claimant states that he considered that both Ms Pithouse and Ms Dibben rather than seeking to gain further information “consistently tried to water down and dismiss matters thus validating the bullying as reasonable behaviour, instead of exploring and establishing what was respectful behaviour to set the tone for a professional work environment”.

184. The meeting on 06 October 2015 ultimately ended with the Claimant saying he was distressed and unable to continue. The meeting was reconvened on 03 November 2015 and the Claimant was accompanied by Ms Davis. The meeting was further adjourned until 16 November 2015 and further resumed on 06 January 2016.

185. With regard to the investigation itself, in addition to the four complainants, Ms Dibben and Ms Pithouse interviewed Ms Adejobi, Ms Mary O'Donovan, Ms

Abigail Fox-Jaeger, Ms Sandra McKenzie, Ms Rebekah Robertson, Ms Evelyn Clarke and Ms Myrna Harding. They also reviewed a 3-inch ring-binder of documents from the complainants and spent many hours preparing a detailed Report addressing the complaints made.

186. It is accepted by the Tribunal that Ms Dibben took notes at the time and had these notes in notebooks. Although they were physically produced at the Tribunal, there were no extracts in the bundles.

187. Ms Dibben's evidence was that she wrote the notes in her own brand of 'shorthand'. What is clear, is that no notes of these meetings in any form were produced to the Claimant and the only references to the evidence produced by the other witnesses were as recorded in the Investigation Report finally provided. The Tribunal concludes on balance that Ms Dibben did take the notes as described and that she spent a number of days working at home to pull all the information together into a basic report and although Ms Pithouse stated that the final decision was hers with overview from Ms Dibben regarding procedure (see paragraph 23 of Ms Pithouse's statement) the Tribunal concludes that it was Ms Dibben who did the majority of the work in drafting the basic Report. Once the draft Report had been produced, Ms Pithouse and Ms Dibben worked on finalising it and were able to refer to Ms Dibben's notes when any queries arose. The Tribunal concludes that this element of the process does not amount to a fundamental breach of contract.

188. On 25 February 2016 there was a team outcome meeting at which the complainants were handed a draft Report. It was anticipated by Ms Dibben and Ms Pithouse that they would go through both the conclusions and the recommendations with the complainants "because we want to hear from you about how you might work with us in taking this forward".

189. The complainants wished to have an opportunity to look at the Report and then reply with comments.

190. The final Report is at page 1108 of the bundle and it is dated 07 March 2016. It is a 22 page document. The Report is entitled "Report of an Investigation into complaint of Harassment and Bullying", although there is cross-reference in the Report to "the grievance".

191. Each of the detailed complaints is considered in the Report with conclusions. The overall conclusions are set out at page 1127:

"That the specific allegation which was made against EA is not upheld.

The documents provided by the complaints team in evidence of their complaints do not show or indicate any unreasonable behaviour towards any member the complaints team. The greater majority the documentation actually confirmed that the allegations made against EA are in reality of longer standing duration. The majority of documents do not even relate or name EA.

It is our conclusion that this is a small team that came together in 2013 through a restructuring process that they feel was unfair and devalued them in the work that they undertake.

In addition, from 2013 there has been a succession of line managers at one point with three different managers managing the five staff in the team. This appears clearly not to have worked and potential resentments were fuelled from the differing management styles.

The complaints team feel their job descriptions do not accurately reflect the work they do and that there are no clear processes in place for the work that they do. Line manager say differently.

There is clearly little or no face-to-face communication and the office environment currently does not lend itself easily to such communication. . .

As a result of the environment and the communication streams of a 'them and us' situation has grown and which has developed a culture of mistrust and toxicity. The interview with one of the current complaints team likened the experience of working within the team as working within a 'war zone'. The culture is described as toxic and that it is a most unpleasant place to work but also stating that the complaints team uses this to their advantage.

The complaints team appear, in the past, to have had little in the way of working boundaries. From speaking to individuals, it is clear that working hours are not clearly defined or adhered to. Trust policies are not always adhered to and in particular there appears to be specific issues in relation to the booking and taking of annual leave, adherence to the sickness absence policy and requesting time of the medical and dental appointments and how that time is subsequently made up. The complaints team did say that they are now using the e-roster system and diary system and it is hoped that these issues will become more transparent for both the staff team and the line management structures".

192. The Report contains a series of 11 recommendations. The complainants appealed against the decision by a letter dated 09 March 2016 (see page 1153). The letter has the header: "Appeal against investigation into Bullying and Harassment Outcome" and states: "As you are aware four members of the Complaints and Serious Incident team made a serious formal complaint regarding Management Approaches and Bullying and Harassment".

193. Dr Brimblecombe replied by an email dated 17 March 2016 at page 1166 and stated: "I am aware of the findings of the investigation, i.e. that there was no evidence of bullying and harassment in this instance, although other useful information did come out of the investigation process. I consider that the investigation was carried out in an extremely diligent and detailed manner by two very senior staff. I now consider the investigation closed and require all staff in all roles in the service to now work in the manner expected of them and to show all colleagues politeness and respect".

194. The Claimant replied in a lengthy email dated 24 March 2016 at page 1163, that email states: "As stated in the complaint itself, this is not also limited to bullying staff by EA, as the convoluted and biased report of your investigators would like everyone to believe. It was to highlight unfair practices employed by senior management within the nursing directorate who were abusing their position of authority for self-interest, self-promotion all in the name of "professional relationship" to benefit only themselves to the stress and detriment of junior staff". It concludes: "I can appreciate that having to deal with the issues we raised shortly before your planned retirement may not be what you wish for. Nevertheless, I believe that there is surely the "need to revisit past events" and I look forward to hearing from you regarding the appeal and a grievance against your investigators within the timeframe set out in the Trust's grievance policy and procedures".

195. Ms Dibben wrote an email to Ms Louise Hall on 29 March which states: "We have now met and started reintegration of this team with three members - but as you can see this man will not give in and is now changing again his tack".

196. There is also communication between Dr Brimblecombe and Ms Dibben also dated 29 March 2016 at page 1167. Dr Brimblecombe asks for advice and states: "Unless I am confused I thought that there was no appeal procedure? I am also confused about Hakeem's reference to 'against investigators' as there is no grievance against the investigators is there? I wonder if we should have a short meeting this week to briefly discuss as this is going to go on and on with no satisfaction arising from any further process. It is beginning to feel as if such responses are becoming harassing and derogatory in themselves, so I wish to take a clear line without it seeming punitive".

197. Ms Dibben confirmed that there was no appeal against a harassment and bullying complaint and highlighted that the Claimant appeared to be trying to widen his complaint to the whole of the senior management team: "I think that we should stick to the policy and you reiterate that the investigation is concluded and that you are encouraging him to now play a positive role in shaping the future the team in which he works etc. I cannot see any hooks where he can take this outside the Trust".

198. On 03 June 2016 the Claimant sent a long email to Dr Matthew Patrick, Chief Executive, who received some input from HR, but the draft proposed email response at page 1294 was not sent. The Claimant wrote a further document to Dr Patrick dated 07 July 2016 at page 1320 of the bundle entitled "Formal Grievance".

199. Dr Patrick replied by a letter dated 14 July 2016 at page 1335. Dr Patrick states: "However, a reading of correspondence together with the investigation report surrounding the collective grievance dated 7th March 2016 appears to demonstrate that most if not all of your concerns have indeed been investigated fully and, where appropriate, addressed. I do therefore need to have absolute clarity as to which aspects you say are new or have not been addressed, and with that in mind I would like to meet with you, along with Louise Hall, in order to consider a way forward… I am concerned to learn from your letter that your

health continues to be a problem and of course I do not wish to take any steps which might exacerbate your current condition. However, I confirm that I would like to meet with you, along with Louise Hall, Director of Human Resources, when we have established that you are fit to return. I understand you have an appointment with Occupational Health on 21st July and I will wait to hear from them before deciding how to proceed".

200. The Claimant gave evidence that he received a copy of this letter together with the subject data access request documentation on 26 July 2016.

201. The Claimant resigned by letter dated 10 August 2016 at page 1368 and which confirms having received the letter from Dr Patrick. The Claimant stated in evidence that he received the letter on 14 July 2015 by recorded delivery, which he rejected, and then later saw a copy of it in the subject data access request documentation.

202. The resignation letter states: "Finally would also like to thank you for your offer to meet with me along with Louise Hall, Director of Human Resources. However, I am unable to accept such a meeting at this stage due to the position you have taken regarding a very flawed process, which supports a culture of cover-up as evidenced by your refusal to my request for my grievance be dealt with by an external/impartial investigation team. Bearing in mind the conclusions you have already come to in your letter of 14 July, I do not see that a meeting will be useful. Furthermore, my psychiatrist and my GP advised me that this ongoing dispute is detrimental to my health and therefore I must take immediate action to protect myself from any further injury".

203. The Tribunal concludes having regard to all of the above process that the Respondent did not fail to investigate adequately or at all the joint complaint as alleged. The Claimant and his colleagues opted and directed for the matter to be considered under the Respondent's Harassment and Bullying at Work Policy. Although there is reference throughout the process to the matter being a 'grievance', the Tribunal concludes that it was clear from the outset what Policy was being implemented and the term grievance was being used as a general description rather than an indication of the policy under which the matter was being considered. Indeed, the appeal letter is entitled 'Appeal against investigation into bullying and harassment'.

204. The Tribunal rejects the Claimant's contention raised later in the internal proceedings where he argues that the matter was transformed into a bullying and harassment complaint by the investigators to deny any right of appeal. The Claimant expressly requested the matter to be considered under that Bullying and Harassment Policy and it is not in dispute that there is no right of appeal under this process.

205. Despite that, Dr Patrick invited the Claimant to discuss all matters with him and in particular to have clarity on the Claimant's position and to consider a way forward. The Claimant declined that invitation.

206. The Tribunal concludes that in addition to the allegation not being made out as fact, the process adopted by the Respondent was not conduct without reasonable or proper cause that was calculated or likely to breach the relationship of trust and confidence with the Claimant.

(l) On 16 October 2015, the Claimant was given a verbal warning in relation to his sickness absence & (m) On 29 October 2015, the Claimant received a formal written warning for sickness absence to remain on his file for 12 months:

207. On 16 October 2015 the Claimant was informed that he would be given a formal written warning in relation to his sickness absence. The outcome letter was provided to the Claimant dated 29 October 2015 at page 666 of the bundle. A full explanation of why the warning was given is set out in that letter and the Claimant was given a right of appeal. The Tribunal concludes that under the Trust Sickness Policy the content of the letter and consequent warning is consistent with that Policy.

208. The Tribunal concludes that of itself there was no breach of the implied term.

(n) On 16 December 2015, Sally Dibben defended comments made by Edith Adejobi and dismissed the Claimant's concerns:

209. By an email dated 16 December 2015 Ms Adejobi wrote to the Ms O'Donovan regarding the Claimant but, in error, sent the email to the Claimant. That email states: "Please could you urgently clarify with Hakeem whether he feels he does not have the competence and/or skill to keep the CCG updated re QAs in the same way we would an MP or councillor during the complaints process. It would be helpful to know the outcome of the conversation and whether: I will be expected to absorb these Band 4/5 tasks into my day to day role; if Hakeem and colleagues have been authorised to decline reasonable requests I may make; and to allocate work to me".

210. That exchange arose from Ms Adejobi asking the Claimant to advise whether the CCG had been updated to which he replied: "I am not aware it is my role to update the CCG in a case you have been liaising with them".

211. The Claimant sent an email of complaint to Ms Dibben and her reply at page 832 states: "I do not agree that it is a slur on your character it is simply a question about caseload and whether she is expected to undertake the role. I do not agree that you inherited the cases from Edith. Edith may have overseen the cases whilst you are on sick leave but I am assuming that the cases are rightly part of your case load and that it is therefore totally appropriate for the cases to be returned to you to complete, takeover and/or conclude on your return to work. I do not think that Mary needs to confirm to you the tone or content of the email as it is addressed to her and it is for her to determine that. Mary just needs to ensure that you and the team are being managed in this investigation process with the cases being dealt with in a timely and appropriate way".

212. The Claimant further complained in an email of the same date to which Ms Dibben also immediately replied: "You should not have been copied into that email as it was a discussion between two managers on information that you would not have been privy to in normal circumstances and therefore we do have to view the conversation in those circumstances, however it is worded. However, if you are saying that your competences were being questioned about work that was not part of your job role then that is a separate issue and Amanda and I will pick this up with EA when we meet with her".

213. The Tribunal concludes that the email from Ms Adejobi erroneously sent to the Claimant and the initial email from the Claimant were both lacking in a degree of diplomacy. However, the Tribunal concludes that Ms Dibben acted reasonably in the circumstances. Her responses to the Claimant fairly addressed the matter and did not amount to a breach of the implied term of trust and confidence.

(o) On 17 December 2015, Amanda Pithouse relocated the Claimant's team to the first floor of the building that they worked in:

214. By an email dated 17 December 2015 Ms Pithouse wrote a group email to employees, including the Claimant and Michelle Davis stating: "Please find attached the proposed office allocation for 111. Can you please send me any comments you may have by 4th January 2016 and I will look into these on my return from leave".

215. That document proposed that the Claimant and Ms Davis were to be located on the first floor. The Claimant did not respond to that email until 5.30 on 04 January and states: "It would appear that my existing health issues have not been taken into consideration regarding this decision to relocate to the first floor".

216. Ms O'Donovan replied: "Everyone was invited separately to feedback to Amanda direct suggestions and concerns they may have regarding the office reconfiguration proposal at the meeting which I recall you did attend. I am aware of previous health concerns raised but I suggest it would be helpful if you could clarify what your current health concerns are and if they will be longstanding with Amanda direct, which would impact on Amanda's proposals outlined in a paper to ensure you are supported throughout this process".

217. Whilst the matter was being reviewed the Claimant remained on the ground floor as was Ms Davis who was also allowed to remain on the ground floor until her health improved. The Claimant was never required to work on the first floor. There was no breach of the implied term of mutual trust and confidence.

(q) On 15 and 18 January 2016 Edith Adejobi breached arrangements preventing her from having contact with the Claimant and his colleagues:

218. As a result of the group bullying and harassment complaint, it was decided that Ms O'Donovan would take over the Claimant's line management responsibilities in place of Ms Adejobi. It was agreed that there would be reduced contact

between Ms Adejobi and the complaints team. It was agreed that contact would be minimal (see page 638 for the agreement).

219. The Tribunal accepts Ms Adejobi's evidence that when working in the same building it was impossible not to have face-to-face contact on occasions, particularly as Ms Adejobi still had some overall responsibilities. On these particular occasions Ms Adejobi considered she required contact for necessary management purposes. The Tribunal was not taken to any other example of a similar alleged breach of the agreement.

220. On 15 January 2016 Claimant wrote to Ms O'Donovan stating: "Please clarify if there has been a change in the agreement that there will be no face-to-face or verbal communication with Edith. She has just walked into our office this afternoon to talk to me in a manner I consider confrontational. I would like to add that this is a second time Edith has been in our office today. Her mannerisms and the way she turned up in the office this afternoon is unsettling".

221. Ms O'Donovan replied: "I will discuss the contents with Sally Dibben and will also reiterate the agreed communication plan with Edith as I am unaware of any changes."

222. Ms Dibben sent an email to Ms Pithouse on 18 January referring to the email trail at page 940 and which states: "We are rapidly reaching a stage when they will not be able to work together if we don't bring them back together now and have mediation… There are some issues about previous communication, allowing the them and us situation to be allowed to develop, and they now see any approach by Edith as unreasonable and confrontational. So I believe we need a serious meeting to put this to them and get them moved and working as a team all together as quickly as possible".

223. The email also states: "Edith is different and does manage things and they are being asked to work outside of their normal 'we know our job'. Edith wants changes that they disagree with and therefore don't implement".

224. There was no evidence of any further similar contact with the Claimant by Ms Adejobi. The Tribunal concludes given all the circumstances that any breach of arrangement on the occasions put before the Tribunal did not amount to a breach of the implied term of mutual trust and confidence.

(r) During an Occupational Health case conference on 21 January 2016, Sally Dibben suggested that the Claimant be redeployed on medical grounds:

225. On 21 January 2016 there was a discussion during an Occupational Health case conference, which is recorded in a draft summary at page 953, where it is recorded: "SD said 'that within these four walls' would HS be interested in her seeking a move to an alternative role within the service, i.e. PALS. SD confirmed that this was outside of medical redeployment but that is something that she could look at if HS felt that it might be of benefit to his health. HS

agreed that this may be a good option for him in the longer term and stated that would be happy for this option to be explored."

226. It is demonstrated by page 953D that the Claimant had an opportunity to amend those notes and made no changes to that record.

227. The Claimant's evidence was that he was taken by surprise and so "out of respect and as a knee-jerk reaction I did go along with the discussion". The Claimant states that it was clear to him that "this was another ploy by employee relations and nursing management to try and 'get rid of the problem' instead of addressing how to improve my working life, which was a purpose of the meeting".

228. The Tribunal accepts Ms Dibben's evidence that she was offering the Claimant an informal route to find an alternative role if that was what he wanted. The Tribunal concludes that the notes are accurate and the Claimant did agree that it was a good option for him and he was happy for it to be explored. It is only in retrospect that he now seeks to place a negative construction upon it.

(s) On 25 January 2016, Sally Dibben took a negative view of the Claimant's request for reasonable adjustments and to remain on the ground floor:

229. The Claimant's potential relocation to the first floor was discussed as part of the Occupational Health case conference and the Claimant argued that climbing the 18 stairs to access the office causes him to feel lightheaded/dizzy and had also been experiencing frequent nosebleeds. He asked if he be could be located on the ground floor.

230. The Claimant amended the notes of the meeting to read: "SD made a point of outlining that there are only 18 stairs as she got the managers to count them. There was some discussion about how walking up and down the stairs impacted on HS's health. SD highlighted that HS usually walks across the road to practice religion 5 times a day, which she said other staff managers do not allow. HS questions why the practising of his religion had been raised that this was not related to issues being discussed".

231. Ms Dibben categorically denies that comment was made and argues that the issue of the Claimant praying was raised at the end of the meeting, not in the context of a reasonable adjustment, but discussed with regard to the Claimant making up working time lost. That evidence is consistent with Ms Dibben's handwritten notes at the time, which demonstrate the stairs issue was discussed and then followed at the end of the meeting where the note records: "five times day - to pray -stays\makes up hours".

232. Also, in an email from the Claimant to Ms Dibben dated 21 January 2016 the Claimant discusses taking prayers: "I do have enough time to compensate the Trust for the three times I go across to Kings during working hours. I also use my lunchtime to compensate for any time necessary".

233. This corroborates that Ms Dibben's recollection and her notes that the context of the Claimant praying was to in relation to making up time.

234. On balance the Tribunal prefers the evidence of Ms Dibben.

235. By an email from Ms O'Donovan to Ms Dibben dated 19 January 2016 at page 946A of the bundle, she notes that there are 18 steps on the ground floor to the first floor and records the Claimant's statement relating to hypertension and possible nosebleeds. Ms O'Donovan stated that she would like some formal notification and advice: "as given the current grievance issues and concerns raised by the team it is important that the team stay together to enhance communication".

236. By an email from Ms Dibben to the Claimant and Ms Sawyer dated 25 January 2016 Ms Dibben states: "Stella I can(t) read what the doctor is saying on this certificate and wonder if you would formally write to him and ask him if he is stating that Hakeem is unable to walk up 18 stairs without a nosebleed - if this is the case I will be extremely concerned for his health at work - and would ask that he is assessed by one of the doctor's in relation to this. When we complete the reasonable adjustments agreement I will take this into account as I believe that Hakeem did say that he would be able to manage the 18 stairs as long as he was not required to go up and down the stairs all day long - which we can accommodate".

237. The Tribunal finds that Ms Dibben did not take a negative view of the Claimant's request for reasonable adjustments and to work on the ground floor. She sought clarification from the Claimant's GP and Occupational Health on the Claimant's circumstances when it was medically suggested that he could not climb stairs without possible dizziness and nosebleeds. Ms Dibben intended to use take that feedback into account when considering the reasonable adjustments agreement.

238. The Tribunal concludes that the allegation has not been made out on the facts. The actions of Ms Dibben do not breach the implied term of mutual trust and confidence.

(t) On 27 January 2016, Mary O'Donovan arranged a supervision meeting on the first floor:

239. On 27 January 2016 Ms O'Donovan emailed the Claimant with regard to a supervision session and stated: "I have left a message on your phone this a.m. There is Information governance training booked in the meeting room, but we could use my office as Kay is at the training, so this will be available".

240. The Claimant replied: "You are aware from previous 1-2-1 meetings with you that I have problems with the stairs so I am not sure as to why an appropriate room has not been identified. I wait to hear from you", to which Ms Donovan replied: "If you are unable to do the stairs, we will have to reschedule as I was unaware there was training booked. I can come down to your office this PM

once Michelle has left. I will book 4:30 pm". The Claimant replied: "Thank you very much".

241. There was no breach of the implied term.

(x) The Claimant's complaint of 14 March 2016 regarding management of the 29 July 2015 grievance was not progressed to a hearing:

242. By an email dated 14 March 2016 the Claimant wrote to Dr Brimblecombe stating "Please find attached letter regarding the Bullying and Harassment case. Your urgent review is appreciated". Attached to that is a letter dated 9 March 2016 commencing at page 1153 of the bundle.

243. The Tribunal has set out above the factual chain of events regarding this matter and that there is no right of appeal against the bullying and harassment complaint decision as that right does not exist under the Respondent's Policy. The Claimant appeared to be seeking a further hearing relating to the bullying and harassment complaint. Dr Patrick reasonably offered an opportunity for the Claimant to meet to clarify aspects of the matter that the Claimant considered were new or had not been addressed and to discuss a way forward. The Claimant declined that offer.

244. The Tribunal concludes that in the circumstances there was no breach of the implied term.

(y) On 30 March 2016, Sally Dibben told the Claimant there was no grievance and that he was confused and misrepresenting facts:

245. By an email dated 24 March 2016 the Claimant wrote to Ms Dibben stating: "As you are aware I strongly disagree with your outcome of the investigation into the grievance I raised together with my colleagues and have appealed to Dr Brimblecombe on 14 March 2016. My appeal still stands. You tried to brush the investigation down to a complaint of bullying and harassment by one individual, which it clearly wasn't, therefore the grievance should have been investigated under the trust's grievance policy. You deliberately refuse to recognise or address that this grievance was not only about Edith A. In line with trust's policy I await Dr Brimblecombe's response following failure to come to a reasonable and fair conclusion in stage 1 of the Trust's grievance procedure. In addition, you must be aware that I raised a grievance against you and Amanda about the manner you carried out the investigation. Therefore, I struggle to understand why I am asked to meet with both of you. Dr Brimblecombe may not welcome my appeal and grievance against you, however he is obliged to deal with it in accordance with the Trust's policy."

246. The letter of appeal dated 9 March 2016 states: "Following receipt of the final report the team wish to lodge an appeal and grievance into a fundamentally flawed, factually inaccurate, biased report" and later states "The appeal grievance is made against the decision", and "the team now request an independent reinvestigation, one which is objective and follows policies and procedures".

247. Accordingly, this letter appears muddled regarding whether or not it is intended as an appeal, grievance, or both. As all of the issues that are raised relate to the preceding investigation report, on a natural reading the Tribunal considers it to be an appeal. It was the Claimant and his colleagues who informed the Respondent that the original complaint was one made under the Bullying and Harassment Policy and therefore was not pursued under a process which was subject to an appeal.

248. In any event, as stated above the matter progressed to Dr Patrick who offered the Claimant an opportunity to meet and discuss outstanding issues.

249. There was no breach of the implied term.

(z) On 01 April 2016, Sally Dibben told the Claimant that his tone was unacceptable:

250. In an email of 30 March 2016 from Ms Dibben to the Claimant she states: "Unfortunately again you are confusing issues and misrepresenting issues".

251. The Claimant replied on 1 April 2016 and states: "I have only come back from annual leave today to find your email which I still struggle to fully understand as at the time of this reply. It will appear the contents are directed not to me but another audience. The generalisations and innuendos are bereft of facts that I wonder how best to respond. However, I have tried to self refer to occupational health after reading your email this morning due to the adverse effect it had on me but unfortunately Stella Sawyer is on leave and no one is available to see me at short notice today. As always you have confused and misrepresented issues… I am amazed (just as my colleagues) by your fictitious statement about me raising my voice and pointing fingers when Amanda said this to me at the meeting on 25 February 2015 (where you had lured us under the false pretext of discussing issues, when in fact you wanted to discuss your outcome of the grievance we had raised). Obviously, the easier policy to follow through as it does not encourage an appeal as you correctly stated. This however does not excuse your mistake of founding your investigation on a bullying and harassment issue, simply because you want to push a grievance under the carpet and 'move on' … It is disheartening that instead of concentrating on my hand-over to my colleagues I am forced to be replying to your email filled with inaccurate statements. I find this very distressing and upsetting and again I struggle to understand your perception of 'Duty of Care'".

252. Ms Dibben replied to that email also on 01 April stating: "I find the tone and content of your email unacceptable and again misrepresentative of the facts. However, the harassment and bullying process is now closed and we are concentrating on moving things forward in a positive fashion. We have had what we consider to be very positive first meetings with other members of the team and was hoping to start the process with you today".

253. The Tribunal concludes in the circumstances that there is no breach of the implied term with regard to the communication from Ms Dibben. It was a

reasonable assessment of the communication by the Claimant. It was not unreasonable given he content of the Claimant's e-mail.

(aa) On 04 April 2016, Neil Brimblecombe told the Claimant that he was not being polite or respectful:

254. On 4 April 2016 the Claimant wrote to Dr Brimblecombe in which he states: "I read your reply to me and my colleagues with trepidation, as I regard it as a further breach of faith that you arbitrarily wish to discontinue the investigation of a complaint, which can impact on the reputation of the Trust… First, I must state that I find your reply to our appeal mind-boggling and insulting considering what me and my colleagues have experienced and suffered under your leadership… Therefore your comments that followed our appeal and the further grievance we have now raised against your investigators are even more disparaging as they articulated not only a lack of awareness of discrimination and unequal opportunities in the Nursing Directorate and elsewhere but active denial of institutional, structural and individual bullying, harassment and denying employees of their fundamental rights in the workplace. Your denial perpetuates victimisation and in and of itself".

255. In response Dr Brimblecombe sent an email to the Claimant dated 4 April 2016: "Thanks for your email. Please note this reply is directed just to you, as some of my comments are directed only to you. I have reviewed the issues that you raised in your email. I remain satisfied that the investigation into the grievance was proper and thorough. I note that you raise some issues that were not included in the grievance. As I stated previously the investigation is now closed and I expect all staff involved to now engage with due process in terms of looking at moving forward. In my previous email I was clear that I expected all staff to act in a polite and respectful way to each other. I do not consider that you are doing so in your email. Please be clear that this is unacceptable in SLaM and I would refer you to the Trust's 5 commitments as a reminder. I do hope that you will now move on from this. I will not be engaging in further discussion about the process that is now closed".

256. The Tribunal concludes that it was objectively reasonable for Dr Brimblecombe to reply to the Claimant in the manner that he did and that in the circumstances it did not amount to a breach of the implied term of mutual trust and confidence.

(bb) On 12 April 2016, Sally Dibben wrote to the Claimant to question whether or not he was resigning:

257. By an email dated 11 April 2016 from the Claimant to Ms Dibben he states: "You are aware I strongly disagree with your outcome of the grievance my colleagues and I have raised against management, bullying and harassment being just one part of this grievance… Subsequently I now consider both my grievances of 29 July 2015 and 14 March 2016 unresolved. Given the above my trust in this directorate's management has entirely broken down. Therefore, I am unable to meet with you this stage. I cannot see on which grounds I could possibly move forward when management keep dismissing legitimate concerns, instead covering up for unacceptable practices." To which Ms

Dibben replied on 12 April: "First I am aware that you disagree with the outcome of the investigation recently undertaken but the issues have been investigated and concluded. As advised to you previously the focus has now shifted to taking the team forward positively and in a supported way and we have had positive first meetings with your team colleagues… As I am assuming that you are not resigning from your role in the complaints team you therefore need to play an active part in shaping the future for you in that team. If you feel that you are not able to continue working in the team then we can talk about what other options might be available to you. But if it is your intention to remain working with the team then you need to work with us. Clearly you keep referring to the impact that the situation is having on your health and we need to talk to you about that. What we really can't have is a constant refusal by you to discuss the issues with us".

258. The Tribunal concludes that Ms Dibben was not questioning whether or not the Claimant was resigning but was predicated her response on the basis that she was assuming the Claimant was not resigning from his role, particularly given statements from the Claimant that his trust in the management had entirely broken down and could not see any grounds on which he could possibly move forward.

259. The Tribunal concludes that the response by Ms Dibben was reasonable in the circumstances and does not amount to a breach of the implied term.

(ee) On 01 June 2016 and 08 June 2016, the Claimant received letters inviting him to a formal sickness review meeting on 14 June 2016:

260. By a letter dated 01 June 2016 Ms Burton wrote to the Claimant confirming receipt of a medical certificate signing the Claimant off work from 09 May 2016 for one month, anticipating being back at work on 09 June 2016 when there would be a return to work meeting. The letter also confirmed a formal sickness review meeting arranged 14 June 2016. The Claimant received a formal invitation to the sickness review meeting by letter dated 08 June 2016.

261. The Tribunal concludes that this course of action was entirely open to the Respondent given the Claimant's sickness absence history. Notification of a formal action was in line with the Respondent's Policy and the Tribunal refers to section 5 of the Sickness Policy, which provides that for a person on long-term sickness there shall be regular sickness review meetings and that warning can be given as an outcome of these meetings if appropriate. There was no breach of the implied term.

(ff) On 15 June 2016, the Claimant received a letter inviting him to a case conference on 28 June 2016 & (gg) On 24 June 2016, the Claimant was a sent a letter reminding him of the case conference on 28 June 2016:

262. By letter dated 14 June 2016 from Ms Burton to the Claimant she states: "I am writing to express my disappointment you did not attend the sickness review meeting this morning at 11 am which was notified to you by recorded delivery letter dated 08 June 2016. Nor did you contact myself, or the HR team to

inform us that you would not be attending. I am aware that you received the recorded delivery letter. In order to take this forward, we have requested a case conference be arranged for you to attend by myself, Dr Haq from the Occupational Health Department and Sally Dibben. You will be contacted further regarding this".

263. In a letter received by the Claimant on 24 June 2016, he was further reminded that the case conference meeting was arranged for 28 June: "To discuss your most recent occupational health report and reasonable adjustments that may need to be made on your return to work. You stated that the occupational health report recommended you not attend formal meetings until "well settled back into the workplace". We have checked with Dr Haq who has confirmed that this applied to formal meetings and not general sickness review meetings. See copy of attached email from her on 24 May 2016".

264. The Claimant replied by a letter dated 25 June 2016 at page 1309 in the bundle confirming that he considered he was not well enough to attend meetings at the moment and how continuously receiving correspondence from the Respondent hindered his recovery.

265. The email from Dr Haq is at page 1243 and states: "Thank you for your email which seeks further clarification. The recommendation is to avoid 'formal' meetings which may form part of the Trust formal process and not general sickness review meetings, although I note strictly speaking they are called formal sickness review meetings and hence your query. Of course, it is understood that management do have to discuss with him in a meeting the new working team arrangements and the feasibility of any recommended adjustments which Mr Shittu will have to attend. I would not expect these standard meetings to cause upset unless Mr Shittu perceives them not to be supportive".

266. The Tribunal concludes that the sending of the letters regarding a case conference on 28 June 2016 was not conduct calculated or likely to destroy the relationship of trust and confidence, particularly given that medical input was sought.

(hh) The Respondent held the 28 June 2016 meeting in the Claimant's absence:

267. The Claimant wrote to Ms Burton by a letter dated 25 June 2016 as stated above, which the Claimant states: "Please be advised that I am not well enough to attend your proposed case conference on 28 June 2016. However, I hope to be able to attend meetings at a later date when my health improves and can be in a position to do so".

268. By a letter dated 27 June 2016 Ms Burton replies: "Thank you for your letter of 25 June 2016 received this morning. We are sorry you are unable to attend the meeting tomorrow. However, the meeting is going ahead during which myself, Sally Dibben and Dr Haq will be discussing the most recent occupational health report and the recommendations".

269. Ms Burton confirmed in evidence that this letter was only sent by standard Royal Mail delivery.

270. By an email dated 28 June 2016 Dr Haq informed Ms Dibben: "I just thought that I should make you aware that if his GP signed him off sick since my last assessment of him, then the situation may have changed and he may now be unfit to attend but without reassessing, I cannot confirm either way. We do always urge employees to attend as far as possible, but if he is not well enough to attend mentally or physically then we would advise you of such. I note that he is not coming in today, but Deborah said that you were intending to meet in his absence. From an OH point of view, in this situation, I would require Mr Shittu's consent to have a case conference in his absence and hence I think best that we should postpone the meeting to a date when he can also attend".

271. However, the meeting went ahead with Ms Burton, Ms Dibben and Dr Haq present, but Dr Haq did not discuss details of the Claimant's case.

272. In the circumstances the Tribunal concludes that it was not a breach of the implied term for the case conference to go ahead in the Claimant's absence. It was intended to be a supportive measure by the Respondent.

(ii) On 14 July 2016, Dr Matthew Patrick advised that all of the Claimant's complaints were investigated fully and requested a meeting with the Claimant:

273. The Tribunal has addressed this matter in detail above. There was no appeal available to the Claimant and Dr Patrick offered to meet with the Claimant in an effort to clarify the outstanding issues and the way forward. The Tribunal concludes that this was a constructive approach from Dr Patrick and with which the Claimant declined to engage. The approach by Dr Patrick was correct under the Respondent's Bullying and Harassment Policy and the offer of the meeting was additional constructive action. There was no breach of any implied term.

(jj) On 26 July 2016, the Respondent provided to the Claimant a response to a subject access request later than the statutory timescales and missing large numbers of documents:

274. The Respondent attended to the Claimant's subject access request and sought to deliver the documentation to him on the deadline of 25 June 2016, however the Respondent had been requested by the Claimant's Counsel not to contact him for two weeks. However, in order to comply with the deadline, the Respondent couriered the documents to the Claimant's home and was informed by the courier that there was no response. The documents were returned to the Respondent who arranged to deliver then to the Claimant at a time convenient to the Claimant.

275. The Claimant's request of 06 June 2016 details the documents that he was requesting, which includes "Transcripts of all my investigation interviews regarding Team grievance of 29 July 2015", however there were none in

existence as Ms Dibben had made her own shorthand notes and transcribing them would have taken many hours. All other documentation was provided.

276. In the circumstances the Tribunal concludes that there was no breach of the implied term.

277. The Tribunal has made conclusions above on each allegation as stand-alone complaints of a breach of the implied term of mutual trust and confidence.

278. It has found that matters (c) and (f) both amount to a fundamental breach of contract.

279. However, the Tribunal has also been careful to stand back and to consider the allegations as a whole and while not amounting individually to breaches of the implied term, to assess whether cumulatively the circumstances give rise to a constructive dismissal.

280. Upon undertaking that exercise the Tribunal concludes that the series of events as a whole do not amount to a fundamental breach of contract. They do not amount to conduct that without reasonable and proper cause was calculated or likely to destroy the relationship of mutual trust and confidence.

281. The individual events in respect of which the Tribunal has found in the Claimant's favour remain as stand alone matters and do not inform or change the Tribunal's view of the other allegations, or lead it to conclude that those other events, whilst not amounting to individual breaches of contract, amount to a fundamental breach when considered together.

282. The Tribunal has considered whether or not the matters raised in paragraphs (c) and (f) that were fundamental breaches of contract formed part of the reason for the Claimant ultimately leaving his employment.

283. The Tribunal concludes that the issue relating to the deduction of pay on 10 April 2015 was extant at the time of the Claimant's resignation and formed part of the reason for the Claimant leaving his employment as set out in his resignation letter. The Tribunal concludes that the Claimant had not affirmed the breach as he had raised it expressly throughout his bullying and harassment complaint.

284. The Respondent has not forwarded a permissible reason for dismissal and therefore the Claimant's constructive dismissal claim is successful on this point.

285. The Tribunal concludes the period of eight weeks before Ms Adejobi contacted the Claimant did not form part of the reason for the Claimant leaving his employment. For example, it was not raised as part of the group complaint which was written contemporaneously with events and it was not mentioned in the Claimant's resignation letter. The Tribunal concludes that by the time of his resignation the Claimant had affirmed the breach by his continued employment for a period of over a year.

Direct discrimination

286. The Claimant relies upon the allegations raised in paragraph 16 b, c, f, h, i, r, s, t, x to bb, ee and ff (as addressed factually above under unfair constructive dismissal).

287. The Claimant relies upon a hypothetical comparator and the actual comparators of Ms Sy (with regard to allegation h) and Ms Davis (with regard to allegation t). Ms Ahronson and Mr Lepper were removed by the Claimant as comparators (the Claimant's submissions being incorrect on this point) and Ms Desa was not used as a comparator.

288. The Tribunal concludes that given the evidence and the above findings of fact, this claim can be addressed in reasonably summary terms. When asking itself the 'reason why' question, the Tribunal finds that the Claimant and his team was considered a challenge to manage and that they wished to maintain a high degree of autonomy over their working practices. Ms Adejobi certainly saw it that way. Ms Adejobi was a new manager and wished to address what she saw as inefficiencies and self-governance within in the department. Ms Adejobi adopted a firm management style. The Claimant resisted that management. It was a case of the immovable object meeting the irresistible force. The Tribunal concludes this circumstance was the reason for all the actions complained of by the Claimant in respect of his direct discrimination claim relating to Ms Adejobi, in so far as the allegations have been made out in fact. Ms Adejobi did not act the way she did towards the Claimant because of any of his disabilities, she acted the way she did in an attempt to manage the Claimant. The Tribunal also reaches that conclusion with regard to the deduction in pay on 10 April 2015, which was not done because of the Claimant's disability of Cancer (or either of the other two medical complaints even if they had amounted to section 6 disabilities at that time), but in an attempt to seek compliance by the Claimant with what Ms Adejobe considered were clear Policy provisions and reasonable management instructions.

289. The Tribunal further concludes that none of the treatment of the Claimant by Ms Dibben, Ms O'Donovan, Dr Brimblecombe, Mr Patrick or any other employee of the Respondent involved in the matters set out in the Claimant's list of issues as amounting to direct discrimination was because of any of his disabilities. Each person involved in those matters acted for reasons untainted consciously or subconsciously by the Claimant's protected characteristic.

290. There is no treatment of any of the comparators that has been identified as being less favourable compared to the Claimant in circumstances that were not materially different. Ms Sy was asked to call in every Monday morning while she was off sick (see page 553). Ms Davis was also allowed to remain on the ground floor with the Claimant whilst she too was recovering from illness. The Tribunal concludes that the request for the Claimant to attend at a meeting was a mistake which was materially different to Ms Davis' circumstances and the Tribunal concludes that because the request was an error, it was not done because of the Claimant's Cancer condition.

291. In any event, adopting a **Shamoon** approach and addressing the 'reason why', the Tribunal concludes that comparators do not take the analysis any further.

Discrimination arising from disability

292. The list of unfavourable treatment raises similar factual allegations to those events addressed above in respect of the unfair constructive dismissal claim. For ease of cross-referencing the Tribunal will address those matters by reference to the constructive dismissal events and the findings of fact contained therein (for example, the unfavourable treatment detailed in paragraph 31(a) of the list of issues is the same event as alleged in paragraph 16(b) of the constructive dismissal claim above and therefore the same findings of fact apply).

293. (b) The Claimant's absence from work through sickness caused delay in Ms Adejobi addressing the stress related risk assessment raised in the Occupational Health Report. The Occupational Health recommendation was received by Ms Adejobi whilst the Claimant was off work through illness. The Claimant did not return to work until after Ms Adejobi ceased to be responsible for his line management. The risk assessment could only reasonably take place when the Claimant attended work. The Tribunal finds as fact that Ms Adejobi did not ignore the recommendation as alleged. The Claimant has not made out the allegation.

294. The Tribunal further concludes these circumstances did not amount to unfavourable treatment, but in any event, they were objectively justified. It was a legitimate aim for the Respondent to implement Occupational Health report recommendations and it was proportionate to do so at a time when the Claimant was well enough to attend at work.

295. (c) The Tribunal concludes that this matter amounts to unfavourable treatment, which was due to the Claimant's absence from work attending at a hospital appointment, which was something arising in consequence of his Cancer condition.

296. The Tribunal concludes that the Respondent cannot demonstrate a legitimate aim as the Tribunal finds that the deduction from wages was unauthorised. Even if the deduction was authorised and amounts to a legitimate aim of enforcing Policy provisions and reasonable management instructions, the matter was not dealt with in a proportionate manner. There was an indication that the pay would be reinstated once the appointment letter was produced, but it took disproportionately long to address and ultimately did not occur. The matter remained outstanding at the time of the Claimant's termination of employment.

297. (d) The Tribunal concludes that in the circumstances it was not unfavourable treatment, objectively considered, for Ms Adejobi to request the Claimant to undertake straight forward and non-time intensive work tasks. In addition, even if it did amount to unfavourable treatment, it did not occur because of something arising from the Claimant's disability of Cancer. Further, it is a

legitimate aim for employees to undertake work within the scope of their contractual duties and that was achieved by proportionate means through reasonable management requests.

298. (f) The Tribunal colludes that the Claimant was absent from work from 14 April 2015 with work related stress. That is indicated in the Occupational Health report dated 24 March 2015 ("Mr Shittu perceives stress at work") and it was confirmed in the Occupational Health Reports of 25 June, 27 July, 14 August and 10 September 2015 up to his return to work on 19 October 2015, which is consistent with the GP certificates.

299. The Report of 25 June 2015 indicates that "stress *may* exacerbate symptoms further associated with his condition" [the Tribunal's emphasis]. The Report does not clarify which condition, but that comment is made directly after referring to the Claimant's Hypertension condition.

300. The Report of 27 July 2015 states: "Mr Shittu informed me that he was assessed by his GP on the 27th July 2015 and continues to be signed off with work related stress" and that: "Mr Shittu reports stress at work. Once he is assessed as fit to return to work, a stress risk assessment will be advised under the Trust mental health guidance on stress management".

301. The Report dated 14 August 2915 records: "He says that he continues to be signed off with work related stress". There is reference to the Claimant's Cancer condition but only with regard to the "likelihood of needing time off work to attend outpatients appointments in future".

302. Therefore, the Tribunal concludes that the Claimant's absence from work was due to his stress condition. There is no material evidence that the Claimant's absence from work was as in consequence of symptoms of the Cancer condition being exacerbated.

303. It follows from that conclusion that the Claimant's absence from work was something arising from his Stress condition. However, the Tribunal has found that the Depression/Anxiety/Stress condition did not amount to a disability until April 2016. Therefore, all the claims of unfavourable treatment because of the Claimant's absences from work during that period were not arising in consequence of a disability.

304. However, should the Tribunal be wrong on the above assessment and somewhere there was evidence to establish overlapping symptoms with the Claimant's Cancer condition that also caused his absence from work at that time, although the Tribunal cannot locate and was not taken to any such evidence, the Tribunal has continued by considering the complaints as if the absence was in consequence of the Claimant's Cancer condition. This is with regard to events (f), (g), (h), (l) and (m).

305. With regard to (f) if there is a link between Stress, the Claimant's Cancer condition and his absence from work, it was unfavourable treatment for Ms Adejobi not to contact the Claimant within the first eight weeks of his sickness

absence. That unfavourable treatment was because of the absence which arose from the Claimant's disability.

306. However, the Tribunal concludes that the Respondent had a legitimate aim of addressing appropriate employee contact during sick leave, but the Tribunal concludes that it was not proportionate to wait for such a long period, particularly when Ms Adejobi could have delegated contacting the Claimant to someone else such as HR.

307. With regard to (g), the Tribunal concludes that regular contract between a line manager and an employee is not objectively unfavourable treatment. It is beneficial for support and update purposes. If it does amount to unfavourable treatment arising from disability, the contact required was a proportionate means of achieving a legitimate aim. Regular and arranged contact is no more than reasonably necessary to achieve the policy aim of supporting and updating a person who is off work on long-term sickness.

308. With regard to (h), this would amount to unfavourable treatment because of the Claimant's absence from work arising in consequence of his disability.

309. However, the Tribunal concludes that it was a legitimate aim for the Respondent to keep in touch with those employees who were absent from work through sickness for both support and updating purposes. That was clearly a real need of the Respondent. The Tribunal concludes that it was a proportionate means of achieving that aim to give a warning of a wage deduction in circumstances where an employee does not comply with reasonably requested contact arrangements and where such a step is allowed under the sickness Respondent's Sickness Policy. It was a means that was no more than necessary in the circumstances.

310. With regard to (i), deducting pay was unfavourable treatment because of the Claimant's absence from work, which would arise from his disability. However, the Tribunal concludes, as above, that it was a legitimate aim for the Respondent to keep in touch with employees who are absent from work through sickness, particularly for support and updating purposes. Deducting pay under the terms of the Respondent's Sickness Policy for failing to keep in touch in accordance with a reasonable management instruction, particularly when a warning had previously been given, was a proportionate means of achieving that aim.

311. With regard to (l) & (m), a formal warning was unfavourable treatment because of sickness absences that would arise from disability. As stated above, it is a legitimate aim for the Respondent to manage employee absences from work. The Tribunal concludes that it was a proportionate means of achieving that aim by complying with its own agreed Sickness Policy and after a sickness review meeting at which the Claimant was given the right to be accompanied and in respect of which all circumstances were reasonably reviewed.

312. (j) The Tribunal has concluded above that the Respondent did not fail to investigate adequately or at all the joint complaint.

313. (n) This complaint does not arise in consequence of any of the Claimant's alleged disabilities. The e-mail by Ms Adejobi raised her frustrations over the difficulties in managing the Claimant and the team. The reply by Ms Dibben was a genuine and reasonable response to the content of the respective e-mail correspondence. The response was not something arising in consequence of any of the Claimant's found or alleged disabilities.

314. (o) The Claimant argues that the unfavourable treatment was being located to the first floor and the Tribunal has found as fact above that the Claimant was never required to work on the first floor. Accordingly, no unfavourable treatment arose.

315. (r) The Tribunal concludes that when Ms Dibben asked whether the Claimant would be interested in relocating as an informal route to find an alternative role, the Claimant agreed and was happy for this option to be explored. The Tribunal concludes that the suggestion did not amount to unfavourable treatment.

316. (s) The Tribunal preferred the evidence of Ms Dibben on this issue. Further Ms Dibben reasonably considered that it was important that the team stayed together for communication purposes and the first floor provided an area where this could be accommodated. A reference was made to Occupational Health at the time by way of a supportive measure and the Claimant was allowed to remain on the ground floor. There was no unfavourable treatment.

317. (t) As found above, arranging the meeting on the first floor was a mistake which was immediately rectified. There was no unfavourable treatment.

318. (y) The Tribunal finds that the Claimant had not made a separate grievance by the letter dated 09 March 2016. It was an appeal which was not available under the Respondent's Bullying and Harassment Policy and under which the Claimant had specifically asked for the complaint to be investigated. Accordingly, the Tribunal concludes that there was no unfavourable treatment in the circumstances.

319. (z) Even if the reply by Ms Dibben dated 01 April 2016 could be considered to be unfavourable treatment, the Tribunal concludes that it was a response to the tone and content of the Claimant's e-mail of the same date, which was not something arising from any of the Claimant's disabilities.

320. (aa) The same conclusion as above is reached with regard to the e-mail from Dr Brimblecombe of 04 April 2016.

321. (bb) The letter of Ms Dibben of 11 April 2016 stated that she assumed the Claimant was not resigning (even though the Claimant had suggested that in his previous e-mail). The conversation focussed on the team moving forward positively in a supported way and the Claimant playing an active role in that process. Therefore, the allegation has not been made out as fact, in any event

does not amount to unfavourable treatment and if it did it was not something arising in consequence of the Claimant's disabilities.

322. (ee) Inviting the Claimant to a formal sickness review meeting in the circumstances does not objectively amount to unfavourable treatment. The sickness review process is a supportive measure. Even if it does amount to unfavourable treatment arising in consequence of the Claimant's disability, the monitoring of sickness absence is a legitimate aim and adhering to an agreed and reasonable Sickness Policy is a proportionate means of achieving that aim. It is no more than necessary to achieve a real need of the Respondent.

323. (ff) The same conclusion is reached as above. The case conference was to discuss the recent Occupational Health Report and possible reasonable adjustments. It was medically confirmed in advance that the Claimant was fit to attend the meeting. There was no unfavourable treatment and even if there was and which also arise from disability, it was objectively justified given the aims of the meeting.

324. Finally, it should be noted that all of the discrimination arising from disability claims relied upon the Claimant's Cancer condition on its own or coupled with Depression/Anxiety/Stress and/or Hypertension. The Tribunal has found that the Claimant's Hypertension condition did not fulfil the definition of disability and the Depression/Anxiety/Stress condition did not fulfil the definition of disability until April 2016 and therefore can only apply to the final four issues raised.

325. Therefore issue (c) above is successful and it remained reviewed and unactioned at the time of the Claimant's termination of employment and consequently the claim was presented within time.

Indirect disability discrimination

326. The Claimant relies upon fifteen pcp's with regard to the indirect discrimination claim as set out at paragraph 19 of the Particulars of Claim at pages 23 and 24 of the bundle. Addressing each in turn:

(19.1) - Workload allocation by line manager Edith Adejobi from March 2015.

327. Ms Adejobi was only managing the Claimant for the period from 02 March 2015 to 09 April 2015 and therefore was only in a position to allocate work during this short period.

328. There has been no evidence of general work allocation to the Claimant by Ms Adejobi and the only occasion raised in evidence related to the Claimant covering some work of Ms Davis when she was absent on leave.

329. The disability relied upon is Cancer. There is no evidence that this pcp placed persons with the Claimant's disability at a particular disadvantage. The Claimant argues that persons with Cancer are more likely to be vulnerable to stress and stress exacerbates the symptoms. The Tribunal has received no

medical evidence that substantiates that generalised proposition. The Claimant's most recent medical report from Dr Brow dated 27 June 2017 addresses the expressly asked question of whether Depression, Anxiety and Stress affects the Claimant's Hypertension, but the Report contains no reference to substantiate whether there is a vulnerability to stress and/or an exacerbation of symptoms caused by stress for those with Cancer generally, or the Claimant and his circumstances specifically.

330. In any event, the work allocation relating to Ms Davis was specific to the Claimant and there was no evidence that anything other than a general work allocation applied to others who did not share the Claimant's protected characteristic. There was no evidence that the general workload placed persons with the Claimant's protected characteristic at a particular disadvantage when compared to those who did not share it.

(19.2) - was withdrawn.

(19.3) - The sickness absence policy in respect of medical appointments.

331. The Sickness Policy was a pcp and it applied to all employees.

332. The Claimant's argument was that he was not at any time prior to 10 April 2015 required to produce written documentation of attendance at medical appointments. If that is correct, then there was no pcp that applied to him as alleged, nor any consequent particular disadvantage.

333. If however medical attendance documentation is required as part of the medical appointment section of the Sickness Policy (which the Tribunal finds it was), the Tribunal concludes that the Policy (including any consequent deduction from wages) did not place persons with the Claimant's protected characteristic of Cancer at a particular disadvantage. The Claimant argues that those with Cancer are more likely to require ongoing treatment and attend at appointments during working hours, which the Tribunal accepts. However, there is no evidence that this would be more prevalent than with other types of disability (e.g. those who do not share the Claimant's protected characteristic). Further, there is no evidence that those who do need to attend at medical appointments during working hours (particularly those with a disability for connected rehabilitation, assessment or treatment, as specifically referred to under the Respondent's policy) would be placed at a particular disadvantage. Provided they adhere to the terms of the Policy, no disadvantage occurs.

(19.4) - The practice or policy of requiring weekly contact with line manger during periods of sickness.

334. The Respondent accepted that this did amount to a pcp.

335. However, there is no evidence that this pcp placed those with the Claimant's protected characteristic of Cancer at a particular disadvantage. There is no evidence that others with Cancer would have found weekly contact stressful or otherwise undesirable. The Claimant himself was content to contact Ms

Dawson. The Claimant personally did not want to contact Ms Adejobi. There was no group disadvantage.

(19.5) - The practice of allowing line managers to interpret the sickness policy at their discretion.

336. The opportunity for the exercise of such discretion within the Sickness Policy was minimal, but nevertheless it existed and applied to everyone who fell under the provisions of the Policy.

337. It is not clear from the list of issues, or indeed the Claimant's submissions, what discretionary element applied by Ms Adejobi caused the alleged particular disadvantage: whether it was the requirement for contact every Monday, deducting pay, or deciding on a period of non-contact.

338. Weekly contact is addressed above, deduction of pay is expressly provided for by the Policy and is addressed below, and there was no evidence that persons with Cancer are placed at a particular disadvantage by any period of non-contact by their line manager or employer generally.

339. There was no evidence that allowing line managers to interpret the sickness policy at their discretion placed persons with the Claimant's protected characteristic of Cancer at a particular disadvantage. It is, of course, possible that the exercise of any discretion could place a person with the Claimant's protected characteristic at an advantage. There was no evidence of group disadvantage.

(19.6) - The practice of deducting pay for failure to comply with line management instructions during sickness absence.

340. It is a pcp under paragraph 3.4 the Sickness Absence Policy that pay can be deducted in circumstances where sickness absence is not reported in line with the Policy which includes local arrangements. This Policy applied to all employees who were absent without leave. They were not entitled to be paid. Those employees who comply with the reporting requirements do not have pay deducted. Again, there is no evidence of group disadvantage and that persons with the Claimant's protected characteristic of Cancer were more likely to fail to comply with line manager's instructions during sickness absence.

(19.7) - The policy of allowing line management to instruct payroll to withhold employee's pay without any prior notification or warning and despite following management instructions.

341. It was Ms Dibben's evidence that she recommended that Ms Adejobi gave prior warning to the Claimant and her evidence was that it was best practice to do so. Also, there is no evidence that the alleged provision criterion and practice had been applied on more than one single occasion (10 April 2015) and only to the Claimant. Although the operation of a discretion in relation to one employee has been held to amount to a pcp (see for example **British Airways plc -v- Starmer** [2005] IRLR 862, EAT) the Tribunal concludes that in the

circumstances of this case this single one off act, which was inconsistent with best practice as seen by the Respondent's HR, does not amount to a pcp.

342. With regard to July 2015, the Claimant was given advance warning. The notice was contained in the recorded delivery letter that the Claimant declined to accept. Further, if it was the policy as alleged, there was no evidence of comparative group disadvantage. There is no evidence to demonstrate that persons with Cancer were placed at a particular disadvantage, for example, than others who had a different type of disability, or who were on long-term sickness with a condition that did not fall within the definition of a disability.

(19.8) - The practice of not re-instating unlawfully withheld pay immediately.

343. The Tribunal makes a similar conclusion to 19.7 above and that in the circumstances of this case the single occasion relating to 10 April 2015 does not amount to a pcp. Ms Dibben indicated that the money would be reinstated but the matter was not addressed.

344. The Tribunal finds that the July deduction was not unlawful as it was sanctioned by the Respondent's sickness Policy.

345. Further, in both cases there was no evidence that the Respondent applied such a provision, criteria or practice to persons with whom the Claimant did not share a protected characteristic, or that it placed those who shared the Claimant's protected characteristic at a comparative particular disadvantage.

(19.9) - was withdrawn.

(19.10) - The practice of failing to enforce separation arrangements during a bullying and harassment or grievance procedure to protect the complainants.

346. There was no evidence that the Respondent operated the above as a pcp generally. A separation agreement was agreed (see page 638). There was no evidence of a practice of failing to enforce separation agreements. The Tribunal concludes that a one-off unrepeated occasion applying to a particular employee in circumstances where complete separation was not realistically possible and management stated it would "reiterate the agreed communication plan" to Ms Adejobi is not in the circumstances of this case a provision, criterion or practice.

(19.11) - The practice of allowing sickness absence and an investigation into a grievance/bullying/ harassment to be conducted by the same individual.

347. The Tribunal concludes that Ms Dibben did not conduct the Claimant's sickness absence procedure. Her role was part of HR support for other managers.

348. Further, there is no evidence of comparative disadvantage. The group bullying and harassment complaint process and outcome applied equally to all members of the team and did not place persons with the Claimant's protected

characteristic at a particular disadvantage compared to those who did not share that characteristic.

349. It is argued in submissions by the Claimant that employees with Cancer are more likely to attend meetings under the sickness absence policy, to have their ability to deliver their role questioned and to have grievances/multiple procedures ongoing. However, there was simply no evidence before the Tribunal to support those propositions.

(*19.12) - The practice of allowing an employee's sickness absence to be managed by a manager who they had raised a complaint about.*

350. There is no evidence that this amounted to a pcp, or that it was equally applied to persons who did not share the Claimant's protected characteristics, or that it placed persons who had the Claimant's protected characteristic at a particular disadvantage when compared to those who did not share that characteristic.

(19.13) - was withdrawn.

(19.14) - The policy of requiring the complaints team to work in the same room and/or on the first floor.

351. The Claimant was never required to work in the same room as the complaints team, nor was he required to work on the first floor, and therefore was not placed at the particular disadvantage complained of, even if it can be so described.

(19.15) - The practice of ignoring or disregarding Occupational Health Advice.

352. The Tribunal concludes that no such pcp was applied. Occupational Health was employed in an advisory capacity only. Whether or not the Respondent acted upon that advice is a matter of discretion for management with assistance from HR. There was no practice of ignoring or disregarding the advice. Even if there was such a pcp, there was no evidence that it was equally applied to persons who did not share the Claimant's protected characteristic, or that there was any comparative group disadvantage.

(19.16) - The practice of requiring face to face attendance at sickness absence meetings.

353. In the Claimant's particular circumstances, it was anticipated that the sickness absence meetings would be face to face, either at work or with the option of being at the Claimant's home.

354. However, it was the evidence of Ms Dibben, accepted by the Tribunal, that it was not a requirement for it to be a face to face meeting.

355. Even if the correct pcp is an anticipation that the sickness absence meetings would be face to face, it was equally applied to all employees and there is no evidence that it placed persons who had the Claimant's protected characteristic

at a particular disadvantage. The Claimant's issue was the person with whom his face to face meetings were to be with, rather than a neutral pcp placing those with a specific protected characteristic at a particular disadvantage.

(19.17) - The practice of delay.

356. The Respondent did not operate a pcp of delay and even if there was delay in the Claimant's particular circumstances there was no evidence of there being any such practice being applied to those who do not share the Claimant's protected characteristic or that persons with the Claimant's protected characteristic were placed at a comparative disadvantage.

(19.18) - was withdrawn.

(19.19) - The policy of not allowing an appeal under the Bullying and Harassment Policy.

357. This was a pcp that applied equally to everyone. There is no evidence of group disadvantage. In fact quite the reverse, as the lack of any right of appeal under the Bullying and Harassment Policy applied to all the other members of the joint complaint and who did not have the Claimant's disability, or any disability Any disadvantage was universally applied.

(19.20) - was withdrawn.

358. The above conclusions demonstrate that the Claimant's indirect discrimination complaints are all similarly flawed. The Claimant is seeking to pursue a claim relating to circumstances unique to him under a type of discrimination claim that requires a neutral pcp, that is applied to all, and causes group disadvantage. Indirect discrimination claims assume equality of treatment. The Claimant's arguments are that, in one way or another, he has been singled out for particular detrimental treatment.

A failure to make reasonable adjustments

359. With regard to the Claimant's reasonable adjustment claim, he relies upon the same pcp's as for the indirect discrimination claim above. The Tribunal will refer to them by the same number.

360. The Tribunal also refers to the findings of fact made in respect of the other claims where relevant.

361. (19.1) - The Claimant relies upon one occasion when Ms Adejobi allocated some of Ms Davis' work whilst she was absent. This occurred on 08 April 2015.

362. Further, although Ms Adejobi describes this in the e-mail exchange as 'additional work' it was no more than to prioritise the small amount of work that was required to be done. Ms Adejobi confirmed to the Claimant that she was willing to support him in managing his time and the Tribunal has found above

that the tasks to be done were not onerous or time intensive. The Tribunal concludes that the Claimant could have fitted the work as requested into his normal working time through re-prioritisation without difficulty.

363. The Tribunal concludes that there was no substantial disadvantage to the Claimant generally (a disadvantage that was more than minor or trivial) and he was not placed at a substantial disadvantage compared to non-disabled persons.

364. Further, if the Claimant was placed at a comparable substantial disadvantage due to the Cancer condition (which was the only disability at this time), the Claimant was absent from work from 09 April 2015 and did not return to work under Ms Adejobi's line management. Therefore, in all the circumstances the Tribunal concludes that a reasonable adjustment was offered at the time of support to the Claimant in managing his time and Ms Adejobi undertaking some of the work that needed to be done. The Claimant did not attend at work under Ms Adejobi's line management for any future reasonable adjustment to be implemented in respect of her work allocation.

365. (19.2) - was withdrawn

366. (19.3) - The Tribunal refers to its conclusions relating to indirect discrimination above with regard to whether or not this amounted to a pcp.

367. The Tribunal concludes that the Respondent's Sickness Policy was a pcp that applied to all employees. All that was required under the Policy was for those staff who had planned time off for medical and dental purposes to produce written confirmation of the appointments. Although it is likely the Claimant was required to produce more written confirmations than non-disabled persons because of his requirement to attend at a greater number of medical appointments due to his Cancer condition, the Tribunal concludes this cannot be described as a substantial disadvantage and being more than minor or trivial. The vast majority hospital appointments are, or can be by request, confirmed in writing, as indeed the Claimant's was on 10 April 2015. The Claimant simply had to produce a copy to the Respondent.

368. However, with regard to the Claimant's absence on 10 April 2015, this clearly placed the Claimant at a substantial disadvantage compared to non-disabled persons as it resulted in a loss of pay. The Tribunal concludes that although it has found that this was an unauthorised deduction, it still amounted to a pcp by the Respondent as the Respondent considered that it was able to make the deduction. A reasonable adjustment would have been not to apply the pcp to those attending at hospital appointments; to give the Claimant advance notification so any representations could have been made before the sum was deducted; or to reinstate any sum deducted as soon as practicable once it is established the absence was due to a reasonable medical appointment that related to disability.

369. (19.4) – The Respondent accepted that this did amount to a pcp. The Tribunal concludes that this did not place the Claimant at a substantial disadvantage

compared to non-disabled persons. The Claimant was off work with Stress and the Tribunal has concluded that at this point in time Stress was not a disability that fell under section 6 of the Equality Act 2010. If there was some overlap between Stress and the Claimant's Cancer condition, the Tribunal concludes that this did place the Claimant at a substantial disadvantage compared to non-disabled persons but only in so far as the contact was to be with Ms Adejobi. However, an adjustment was made within a reasonable space of time that the Claimant could contact another member of staff, which he did.

370. (19.5) – This pcp was applied, although to a minimal degree. The Claimant has not articulated in his submissions what exercise of discretion is relied upon. The Tribunal concludes that there was no evidence that the Claimant was placed at a substantial disadvantage compared to non-disabled persons that has not otherwise been addressed in this section.

371. (19.6) – This was a pcp that applied to all employees. The Tribunal concludes that the Claimant was not placed at a substantial disadvantage compared to non-disabled persons. There was nothing relating to the Claimant's Cancer condition that made it more difficult for him to understand and/or comply with management instructions whilst on sickness absence.

372. (19.7) – This did not amount to a pcp, as set out above under indirect discrimination.

373. (19.8) – There is no evidence that the Respondent applied this pcp as alleged.

374. With regard to the April 2015 deduction, there was no pcp of not reinstating unlawfully withheld pay immediately. There may have been delay in addressing the matter and a failure to make the repayment, but it did not amount to a pcp in the circumstances. It was an untypical (possibly unique) state of affairs and in the circumstances not re-instating pay immediately cannot reasonably be described as being a provision, criteria or practice.

375. With regard to July 2015, the Tribunal concludes that the Claimant's pay was not unlawfully withheld in the first instance. The Claimant had failed to comply with Policy which allowed for the deduction. If the deduction was unauthorised, there was no evidence to indicate that the Claimant was placed at a substantial disadvantage compared to non-disabled persons. The Tribunal concludes that the Respondent would have treated a non-disabled person on long-term sickness absence in the same way as the Claimant in similar circumstances. Indeed, the reason why the Claimant was off work at that time was due to Stress and not his Cancer condition. At that time the Claimant's Stress/Anxiety/Depression condition did not fall within the definition of a disability.

376. (19.9) - was withdrawn

377. (19.10) - The Tribunal refers to the indirect discrimination findings above and concludes that there was no evidence that the Respondent operated such a pcp.

378. (19.11) - The Tribunal refers to the indirect discrimination findings above and concludes that there was no evidence that the Respondent operated such a pcp.

379. (19.12) - The Tribunal refers to the indirect discrimination findings above and concludes that there was no evidence that the Respondent operated such a pcp.

380. (19.13) - was withdrawn.

381. (19.14) – The Claimant was not required to work on the first floor and did not ever do so. Therefore, there was no applied pcp and no substantial comparable disadvantage.

382. (19.15) - The Tribunal refers to the indirect discrimination findings above and concludes that there was no evidence that the Respondent operated such a pcp.

383. (19.16) – The Tribunal refers to the indirect discrimination findings above. There was no such requirement, but even if the pcp was an anticipation that sickness absence meeting would be face to face, the Tribunal concludes that this did not place the Claimant at a substantial disadvantage compared to non-disabled persons. The Claimant's difficulty was not the fact that sickness absence reviews were face to face but that he did not want them being undertaken by Ms Adejobi. In addition, that difficulty related to the Claimant's Stress condition, which at the material times did not fall under the definition of disability.

384. (19.17) - The Tribunal refers to the indirect discrimination findings above and concludes that there was no evidence that the Respondent operated such a pcp.

385. (19.18) – was withdrawn.

386. (19.19) – This was a pcp applied by the Respondent. The Tribunal concludes that this policy did not place the Claimant at a substantial disadvantage compared to non-disabled persons. This pcp was equally applied to all employees and in the Claimant's specific circumstances, to the other members of the complaint group. There is no evidence that the Claimant was placed at a substantial disadvantage compared to non-disabled persons and non-disabled persons in the complaint group. Dr Patrick gave the Claimant the opportunity to discuss his new grievances with him, which in the circumstances would amount to a reasonable adjustment if there was any comparable disadvantage, but the Claimant declined to take up that opportunity.

387. (19.20) – was withdrawn.

388. Therefore issue 19.3 above is successful and the adjustment remained unactioned up to the Claimant's termination of employment. The Tribunal

concludes that following the Court of Appeal decision in **Matuszowicz** (above), the time limit starts from the expiry of the period within which the Respondent might reasonably have been expected to make the adjustment. The Tribunal considers that as the reinstatement of the Claimant's pay was to be reviewed with a positive indication that the money would be repaid, it leads the Tribunal to conclude that there was no single refusal to pay but a continuing act and the claim is therefore in time.

Harassment

389. The Claimant's allegations of harassment are set out in paragraph 43 of the list of issues.

a) Between April and July 2015, the Claimant was forced to repeat himself and contact occupational health.

390. The Claimant self-referred himself to Occupational Health. He was not forced to do so by the Respondent. Therefore, this cannot amount to unwanted conduct by the Respondent. Ms Adejobi also referred the Claimant to Occupational Health, which was reasonable for her to do in the circumstances. If the referrals amounted to unwanted conduct the Tribunal concludes that it did not have the purpose of creating a prohibitive environment and did not have that effect when having regard to all the circumstances, the perception of the Claimant and whether it was reasonable for the conduct to have that effect. The referrals by the Respondent were to obtain advice on the Claimant's condition, what support and reasonable adjustment measures might be taken and the prognosis moving forward in line with the Respondent's duty of care.

b) On 23 July 2015, Edith Adejobe wrote to the Claimant to advise him that she had instructed payroll to stop his pay.

391. The Tribunal finds that this amounts to unwanted conduct. It also related to disability as the reason for the Claimant's absence from work was due to his Cancer condition. However, the Tribunal concludes that it did not amount have the purpose or effect of creating a prohibited environment. The Respondent had given the Claimant a reasonable management instruction with which he did not comply. He was warned that continued non-compliance would lead to a deduction in pay. The Claimant had declined receipt of the recorded delivery letter. As a consequence an instruction was given to stop pay. That instruction was in accordance with the Respondent's Sickness Policy and reasonable advance warning had been given to the Claimant. The Tribunal concludes that in those circumstances the actions of the Respondent did not have the purpose of creating an environment prohibited by the statutory provisions and it did not have that effect having regard to all the circumstances, the perception of the Claimant and whether it was reasonable to do so.

c) From 29 July 2019 onwards the Claimant was treated with hostility and disrespect by Amanda Pithouse and Sally Dibben by telling him that he was being aggressive, being subjected to hours of questions in a dismissive manner during the grievance investigation and because his complaints were not treated seriously.

392. The Tribunal finds as fact as set out above that this allegation is not made out. Ms Pithouse and Ms Dibben managed what at sometimes could be very difficult circumstances in a reasonable manner. The Tribunal also finds as fact that this includes the bullying and harassment complaint investigation. The Tribunal finds that the investigation was taken seriously and undertaken reasonably.

d) On 16 December 2015 the Claimant was copied into a hostile e-mail from Edith Adejobi which was defended by Sally Dibben.

393. The Tribunal concludes that the e-mail sent to the Claimant did amount to unwanted conduct. The Tribunal concludes that it did not relate to disability. It was an e-mail about Ms Adejobi feeling she was required to absorb Band 4/5 tasks within her own role, which should have been done by the Claimant and his colleagues. There was no issue related to disability or specifically the Claimant's Cancer condition.

394. The conduct of Ms Dibben in her reply was also not related to disability. She was addressing the e-mail sent by Ms Adejobi and the Claimant's response in which he thought it displayed a demeaning approach that undermined his ability. Further Ms Dibben addressed the matter in a reasonable manner and did not have the purpose or effect of creating a prohibited environment.

e) On 15 January 2016 and 18 January 2016, Edith Adejobi ignored arrangements requiring her not to have any direct contact with the four complainants to the grievance against her.

395. The Tribunal concludes that although this amounted to unwanted conduct, it was not related to disability. The arrangements were put in place with regard to the whole team as demonstrated by page 638 of the bundle. Ms Adejobi considered that she needed to converse with the Claimant about work related matters on that occasion. They were not circumstances related to disability.

f) During a case management conference on 21 January 2016, Sally Dibben suggested that the Claimant was allowed prayer time as a reasonable adjustment and that he should be medically redeployed.

396. The Tribunal has found as fact that the first part of this allegation is not made out. The conversation was about working time and was not related to the Claimant's disability.

397. Further, redeployment was raised as a possible option if the Claimant was agreeable. It was a positive suggestion. The Claimant was happy for this option to be explored. The Tribunal concludes that it did not amount to unwanted conduct and certainly did not create a prohibited environment.

g) On 25 January 2016, Sally Dibben took a negative view of the Claimant's request to remain on the ground floor and required him to obtain certification from his GP to confirm he should avoid climbing stairs.

398. The Tribunal has found as fact that Ms Dibben did not take a negative view of the Claimant's request to work on the ground floor. She sought medical clarification of the Claimant's circumstances when it was suggested that using stairs could give rise to possible dizziness and nosebleeds. She was understandably concerned about the Claimant's health and intended to take the medical information into account when considering reasonable adjustments. Therefore, the allegation has not been made out and the Tribunal concludes that the action of Ms Dibben cannot be considered as unwanted conduct and even if it can, it did not have the purpose or effect of creating a prohibited environment.

h) On 27 January 2016, Mary O'Donovan arranged a supervision meeting on the first floor.

399. The Tribunal concludes that even if this amounts to unwanted conduct relating to the Claimant's disability, it did not have the purpose or effect of creating a prohibited environment. It was an error and was immediately rectified.

i) On 01 April 2016, Sally Dibben told the Claimant that his tone was unacceptable.

400. The Tribunal concludes that if this amounts to unwanted conduct, it was not related to disability. It was in response to comments made by the Claimant that Ms Dibben could reasonably assess in the way that she did. Given the tenor of the communications the Tribunal also concludes that the conduct did not have the purpose or effect of creating a prohibited environment having regard to the perception of the Claimant, the other circumstances and whether it is reasonable for the conduct to have that effect.

j) On 04 April 2016, Neil Brimblecombe, told the Claimant that he was not being polite or respectful.

401. The Tribunal reaches a similar conclusion to the above. If this amounts to unwanted conduct, the Tribunal concludes that it was not related to disability, but was in response to comments that could reasonably be assessed in the way it was by Dr Brimblecombe. Again, given the tenor of the communications the Tribunal also concludes that the conduct did not have the purpose of creating a prohibited environment or that effect having regard to the perception of the Claimant, the other circumstances and whether it is reasonable for it to do so.

k) During 2016, the Respondent bombarded the Claimant with letters during his sickness absence.

402. The Tribunal finds as fact that the Claimant was not bombarded with letters as alleged. The Claimant was absent from work through sickness for a long period. The Respondent was perfectly entitled, indeed obliged, under the Sickness Policy to keep in touch with the Claimant. Sometimes the letters were in response to those written by the Claimant, sometimes letters were sent in various ways to ensure receipt. The Tribunal concludes that the sending of letters to the Claimant did not amount to unwanted conduct. If it did, it would

have related to disability, but the Tribunal concludes that did not have the purpose or effect of creating a prohibited environment.

l) During 2016, the Respondent shut down attempts by the Claimant to raise his complaints.

403. The Tribunal finds that this allegation is not made out in fact. The Bullying and Harassment complaint was addressed. There was no right of appeal under that Policy. The Claimant and his colleagues specifically requested that their complaint was considered under that Policy. Nevertheless, Dr Patrick invited the Claimant to discuss his outstanding grievances, which the Claimant declined to do. Therefore the Tribunal concludes that there was no unwanted conduct, but even if there was and it related to the Claimant's disability, it did not have the purpose or effect of creating a prohibited environment.

404. As with the constructive dismissal claim, the Tribunal has been careful to take a step back and considered the allegations of harassment as whole. In doing so it reaches the conclusion that the Respondent has not engaged in unwanted conduct related to disability that had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. In deciding whether it had that effect the Tribunal has had regard to the perception of the Claimant, the other circumstances and whether it is reasonable for it to have that effect.

Victimisaton

405. The Claimant relies upon eight protected acts as set out in paragraph 45 (a) to (i) of the List of Issues, the Claimant having withdrawn alleged protected act (d).

406. The Respondent accepts (a) and (i) as being protected acts, buts disputes (b) to (h) and also disputes that (a) and (i) were made in good faith.

407. The Tribunal has reached its conclusions below and has done so on the basis that all of the alleged protected disclosures have been made out in fact and law.

408. With regard to the alleged detriments, the Claimant relies upon paragraph 16 j and n to ff, subject to matters that were withdrawn, which leaves paragraph 16 j, n, o, q, r, s, t, x, y, z, aa, bb, ee and ff. The Claimant also relies upon another four alleged detriments set out in paragraph 49 c to e of the List of Issues.

409. As set out above, the Tribunal has concluded that the allegations made in paragraphs j, s and bb did not occur as argued.

410. n) Ms Dibben's response was genuine and reasonable and based solely on the content of the respective e-mail correspondence. The Tribunal concludes that this complaint was not a detriment because the Claimant did any of the alleged protected acts.

411. o) The Claimant was not required to move to the first floor and never was relocated there. The suggested relocation was for operational purposes. The Tribunal concludes that, objectively considered, this complaint did not amount to a detriment and in addition was not done because the Claimant did any of the alleged protected acts.

412. q) The Tribunal concludes that although this amounted to unfavourable treatment, it was not a detriment done because of any of the Claimant's alleged protected acts. The Tribunal concludes that Ms Adejobi considered that on this day she needed to converse with the Claimant about work related matters. That is why she acted as she did. This matter only arose on this single day and no other occasions were referred to in evidence. The Tribunal concludes that Ms Adejobi did not take this action because of any of the Claimant's protected acts.

413. r) The Tribunal concludes that in the circumstances, objectively considered, this action did not amount to a detriment. It was a genuine and reasonable suggestion by Ms Dibben as an informal route outside procedures made on the basis it might benefit the Claimant's health. It was a suggestion the Claimant stated at the time he was happy to explore.

414. t) The meeting did not take place on the first floor as it was immediately rescheduled. The Tribunal concludes that, objectively considered, this complaint did not amount to a detriment and in addition was not done because the Claimant did any of the alleged protected acts.

415. x) The Respondent correctly considered that there was no right of appeal under the Bullying and Harassment Policy. The Tribunal concludes that an objective reasonable employee would not consider a lack of appeal would amount to a detriment where a complaint was brought under an agreed procedure as specifically requested and in which there is no right of appeal. Further, even if it did amount to a detriment, the conclusion by the Respondent that there was no right of appeal was because it accepted the complaint under the Bullying and Harassment Policy as requested, that Policy gave no right of appeal and the Claimant's 14 March 2016 correspondence was considered to be an appeal. It was a matter of process and was not done because of any of the Claimant's alleged protected acts.

416. y) The Tribunal reaches a similar conclusion on this matter as set out above. Ms Dibben's e-mail of 30 March 2016 contained her genuine review of matters as she saw them. The earlier communication from the Claimant did appear muddled and on a natural reading does appear to be an appeal, in respect of which no right existed under the Policy. Ms Dibben reasonably considered it that way and her views were expressed because that is how she understood the position and process, not because of any of the Claimant's protected acts.

417. z) If the reply by Ms Dibben dated 01 April 2016 could be considered to be a detriment, the Tribunal concludes that Ms Dibben responded to the tone and content of the Claimant's e-mail of the same date, not because of any of the Claimant's alleged protected acts.

418. aa) The same conclusion is reached as above with regard to the communication by Mr Brimblecombe.

419. ee) The Tribunal concludes that the Respondent's course of action with regard to the formal sickness review meeting did not amount to a detriment when objectively considered. It was a supportive measure. If it did amount to a detriment, the Tribunal concludes that it was done because of the Claimant's absence from work and sickness absence history. It was not done because of any of the Claimant's protected acts.

420. ff) The Tribunal reaches a similar conclusion to the above. It was a meeting to discuss the recent Occupational Health Report and possible reasonable adjustments and it was medically confirmed in advance that the Claimant was fit to attend. Objectively considered it does not amount to a detriment, but if it did the Tribunal concludes that it was done because of the Claimant's health condition, not because of any of his protected acts.

421. The four additional matters are set out in paragraph 49 of the list of issues:

422. 49(b) – Having Sally Dibben become involved in managing his sickness absence inappropriately.

423. The Tribunal concludes that this allegation was not made out as fact. Ms Dibben did not manage the Claimant's absence. In her role as Head of Employee Relations she supported the appropriate managers, which she had done before the Claimant had made any of the alleged protected acts.

424. 49(c) - Failure to follow up issues relating to management and stress issues raised in the stress risk assessment questionnaire that the Claimant completed on 03 December 2015.

425. The Claimant was provided with a risk assessment questionnaire by Ms Cherry Cornelius, Health & Safety Risk Manager, on 04 November 2015. Ms Cornelius had agreed to conduct the stress risk assessment and in a letter states: "When the questionnaires have been analysed the results will be discussed with you. At that stage you will be invited to attend a focus group to discuss and confirm the results, decide what the key issues are, and reach agreement on appropriate actions". The Claimant completed and returned the questionnaire on 03 December 2015.

426. The Tribunal concludes that it was for Ms Cornelius to review the risk assessment questionnaires and implement any resulting actions. Other managers were reliant on her actions given the health and safety role that she held. The Tribunal has received no evidence that Ms Cornelius knew of any of the alleged protected acts or evidence to suggest any of her actions or omissions were done because of any of the alleged protected acts.

427. 49(d) – Having to engage in protracted correspondence about his phased return and use of holiday to augment his phased return.

428. In a letter dated 07 September 2015 Dr Harris noted the Claimant had 40 days of annual leave outstanding and advised the Claimant to take some time off to enhance his recovery. The Claimant's phased return to work commenced on 19 October 2015. The Tribunal finds as fact that the communications over the phased return to work were not protracted and demonstrate that Respondent was endeavouring to reduce the Claimant's risk of loss of pay during his phased return period and sick leave. There is no material evidence to suggest that the Respondent's actions were anything other than attempt to assist the Claimant back to work, with minimal loss of pay and in line with medical advice. The Tribunal concludes that the Claimant was not subjected to a detriment and if he was it was not done because of any of the alleged protected acts.

429. 49(e) – Hounding the Claimant in the workplace and making him unpopular as a result of raising the 29 July 2015 complaint.

430. The Tribunal has set out its findings of fact above, particularly with regard to the unfair constructive dismissal claim and concludes that the Claimant was not hounded out of his employment. The Tribunal has received no material evidence to demonstrate that the Claimant was made unpopular by the July 2015 grievance. Indeed, no cross-examination was led on that specific point. The issues relating to management are set out above. There was no evidence of the Claimant being made unpopular with staff.

Unauthorised deductions from wages

431. The Claimant's claim regarding the deduction from wages on 10 April 2016 is successful but it was presented to the Tribunal out of time, the ET1 having been presented on 26 October 2016. The Tribunal concludes that it was clearly reasonably practicable for the Claimant to present a claim in time. He was aware of the existence of employment tribunals, the applicable time limits, the facts giving rise to the claim, and the fact it was a claim that could be pursued at an employment Tribunal. There was no impediment to him making a claim. Accordingly, the claim is out of time, it was reasonably practicable for the Claimant to have presented it within time and the Tribunal has no jurisdiction to consider it.

432. The Tribunal reaches the same conclusion in respect of any non-reinstated wages for July 2015. Although it was not clear from the evidence whether all monies instructed to be stopped were actually deducted or if so, were not reinstated. If any money remained outstanding that too would be out of time and it was reasonably practicable to present the claim within time for the same reasons given above.

Employment Judge Freer
Date: 13 December 2018